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Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,

PETITIONERS,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the constitutionality of a public school district's student speech policy imposing a sweeping ban on the distribution of any written material should be evaluated under the "substantial disruption" standard established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which this Court has generally applied to restrictions on student speech, or whether because the student speech policy is facially content- and viewpoint-neutral, it should be evaluated under the less exacting "intermediate scrutiny" standard established in *United States v. O'Brien*, 391 U.S. 367 (1968), which this Court has applied to restrictions on expressive conduct that have only an incidental effect on First Amendment freedoms.

RULE 14.1 STATEMENT

The following parties are not listed on the caption but participated in the proceedings below.

1. Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School.

2. Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School.

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PETITION FOR A WRIT OF CERTIORARI

This petition presents the Court with an opportunity to reaffirm the continuing vitality of its student speech jurisprudence, anchored by its landmark decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, and in subsequent cases refining that decision, the Court has struck a careful balance between, on the one hand, students' "undoubted" right "to advocate unpopular and controversial views in schools," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), and, on the other, the need for school officials to restrict student speech given the "special characteristics of the school environment." *Tinker*, 393 U. S. at 506. In balancing these competing considerations, the Court has held that, unless speech is lewd, vulgar, school-sponsored, or drug-promoting, *Tinker* provides the general rule: *i.e.*, student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513; *see also Morse v. Frederick*, 551 U.S. 393, 422–23 (2007) (Alito, J., concurring).

The Fifth Circuit's decision below jettisons that standard and, instead, borrows the less exacting "intermediate scrutiny" standard from *United States v. O'Brien*, 391 U.S. 367 (1968), ordinarily used to assess restrictions on expressive conduct resulting in only "incidental limitations on First Amendment freedoms." *Id.* at 376. The Fifth Circuit held that, even when a school district policy targets pure student speech, a lower standard of

scrutiny is appropriate as long as the policy is facially content- and viewpoint-neutral. But *Tinker* already provides a test tailored to the time and place of the school setting. Lowering the standard of review further for neutral time, place, and manner restrictions in the school setting amounts to impermissible double counting that dilutes the First Amendment's protections.

In this case, the effect of that diluted standard of review was dramatic: the school district did not even attempt to defend its draconian student speech policy under *Tinker*. Yet the court of appeals blessed the policy, permitting the school district to impose sweeping restrictions on pure student speech. Moreover, the dispute over the standard of review is cleanly presented in this case. The district court recognized the importance of the standard of review to the resolution of this case and certified the issue to the Fifth Circuit. The Fifth Circuit then decided the issue in a way that deviates from this Court's precedents and radically under-protects student speech. The Court's intervention is needed to correct the Fifth Circuit's improper doctrinal departures, including its decision to discard constitutional principles that have long grounded the Court's student speech jurisprudence.

Apart from contravening this Court's precedents, the Fifth Circuit's decision also further deepens an existing and well-recognized conflict within the courts of appeals on a recurring issue of practical and constitutional importance—namely, the proper standard to apply when a school imposes

restrictions on pure student speech that are facially content- and viewpoint-neutral. The Court's guidance is needed to restore clarity to this unsettled area of law.

OPINIONS BELOW

The court of appeals' decision is reported at 589 F.3d 740 and reproduced in the Appendix at App. 1. The court of appeals' unpublished order denying rehearing and rehearing *en banc* is reproduced at App. 15. The decision of the United States District Court for the Eastern District of Texas does not appear in the official reports but is available at 2007 WL 654308 and is reproduced at App. 17.

JURISDICTION

The court of appeals rendered its decision on December 1, 2009. App. 1. It denied petitioners' timely petition for rehearing and rehearing *en banc* on January 5, 2010. App. 15. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. CONST. amend. I.

STATEMENT OF THE CASE

This case involves a northern Texas school district that has attempted to banish religious expression from school. The school district has adopted a series of student speech policies that purport to prohibit virtually all non-verbal student speech in any school-related context, and have been used by school officials to root out religious speech. School officials have never justified their sweeping restrictions on student speech as necessary to avoid substantial disruptions to school operations. Instead, they persuaded the court below that the all-encompassing nature of their speech suppression is a constitutional virtue that lowers the level of scrutiny and obviates the need to justify the policy as necessary to avoid substantial disruption.

A. The Initial Student Speech Policy

1. Respondent Plano Independent School District ("PISD") has long maintained a student speech policy, entitled *Student Expression: Distribution of Nonschool Literature*, that gives school officials broad authority to restrict virtually any and all forms of non-verbal student speech. Until April 2005—after petitioners filed this lawsuit—the PISD policy broadly restricted students' distribution of any "written material, tapes, or other media." Among other things, the policy (i) required that all students submit any written materials they wished to distribute to the school principal for prior review and approval; (ii) banned the distribution of any material in classrooms and hallways; and (iii) provided that

materials could be distributed only at a school-designated area subject to further time, place, and manner restrictions. App. 95. When PISD formally adopted the policy in October 2003, the PISD Board of Trustees did not consider or offer any evidence concerning the need for the policy.

2. Although the policy purported to impose a broad ban on distributing any kind of written material, in practice, the speech code was used by PISD officials to promote an anti-religious orthodoxy and to root out any and all student religious speech. In particular, PISD officials applied the *Student Expression* policy to prohibit students from distributing materials with religious messages, while at the same time permitting students to distribute materials containing non-religious messages.

For example, in December 2001, as part of a school-sponsored winter break party where students were allowed to exchange gifts, first-grader Michaela Wade brought goodie bags containing candy canes and pencils to give to her classmates. *See* Second Am. Compl. ¶ 6.71. Michaela's teacher asked Michaela whether the bags contained anything "religious" and, upon inspecting the bags, confiscated the pencils because they were inscribed with the message "Jesus is the reason for the season." Second Am. Compl. ¶¶ 6.77-6.79. The school principal later instructed Michaela's mother that, under PISD policy, the candy canes were permissible gifts but the "religious" pencils were not. Second Am. Compl. ¶ 6.100.

In December 2003, third-grader Jonathan Morgan wished to give his classmates goodie bags containing pens shaped as candy canes at another winter break party where students were allowed to exchange gifts. Each pen was affixed to a card, entitled "Legend of the Candy Cane," containing a poem about the Christian origin of candy canes. App. 65. A few weeks before the party, Jonathan's parents met with PISD officials and asked about the school's policy prohibiting students from exchanging religious gifts and from writing "Merry Christmas" on personalized student-made holiday cards sent to military troops and nursing homes. At the meeting, the principal confirmed that a PISD policy approved at the "highest level" barred students from including religious messages in their goodie bags and from using the word "Christmas." App. 66. On the day of the party, Jonathan's teacher stopped Jonathan from bringing his goodie bags into the classroom because they contained "religious" messages. Other students whose goodie bags did not contain religious messages were allowed to distribute their gifts regardless of what message those gifts may have conveyed. App. 67.

In January 2004, fifth-grader Stephanie Versher held a "half-birthday" party at school—a customary practice for PISD students whose birthdays fall within the summer months. App. 70. PISD students celebrating half-birthdays typically distribute snacks and gifts to other students, which have included items such as bookmarks, key rings, bracelets, and pencils. App. 70. Stephanie wished to give each classmate a brownie and two pencils, one inscribed with the word "moon," and one with

"Jesus loves me this I know for the Bible tells me so." App. 71. On the day of the party, a school official handed Stephanie's mother a letter stating that she was improperly distributing material to students on school property. App. 71. The letter warned that, if Stephanie's mother failed to submit the materials to the principal for prior review, or failed to leave school grounds when requested, the school would call the police. App. 71. The principal further explained to Stephanie's mother that her fifth-grader was distributing objectionable "religious" material with a message with which other students might disagree. App. 72. The principal instructed that Stephanie could distribute the brownies and "moon" pencils, but not the pencils that mentioned "Jesus." App. 72. After school, when Stephanie was giving pencils mentioning "Jesus" to friends on the school lawn, the principal grabbed her, confiscated a pencil she had given a classmate, and informed her that it was impermissible to distribute pencils with religious messages on school property. App. 73. School officials then warned Stephanie's mother that Stephanie could be expelled if she again tried to distribute materials to her friends at school if the materials included a religious message. App. 73.

3. On other occasions, PISD officials employed the *Student Expression* policy to prohibit students from discussing "religious" events or distributing free tickets to those events. In April 2003, for example, second-grader Kevin Shell wanted to tell his school friends about free tickets to his church's Easter sunrise service. App. 62. Kevin's teacher consulted the principal, who explained that PISD

policy prohibited "religious" tickets from being discussed or distributed on school property. App. 62-63. The following month, Kevin was again told that he could not mention or distribute free tickets to a spring musical at his church. A school official informed Kevin's mother that PISD policy prohibited elementary students from discussing or distributing materials expressing a religious viewpoint. App. 64. In January 2004, Kevin's mother asked the school official and the principal about the possibility of offering her son's friends free tickets to a church rally. App. 69. The principal stated that her son could not mention or distribute tickets to any religious event.

In January 2004, fifth-grader Stephanie Versher wished to give her friends free tickets to a Christian drama. Outside of class, Stephanie offered tickets to a few friends who had expressed an interest in attending. App. 69-70. Stephanie's teacher, after consulting with the principal, threw away the tickets and prohibited Stephanie from giving away any more tickets to religious events. App. 70.

B. The Amended Student Speech Policy

1. On December 15, 2004, petitioners—four families whose children are (or were) students at PISD public schools and were prohibited from distributing materials deemed "religious"—filed suit against PISD and two PISD school principals, Lynn Swanson and Jackie Bomchill, in the District Court for the Eastern District of Texas. Complaining that school officials were impermissibly restricting speech and

discriminating against religious views, the petitioners requested a temporary restraining order, preliminary and permanent injunctive relief, declaratory judgment, nominal damages, and attorney's fees. App. 33. On December 16, 2004, the district court issued a temporary restraining order prohibiting PISD, Swanson, and Bomchill from "interfering with or prohibiting Plaintiffs and other students from distributing religious viewpoint gifts to classmates at the December 17, 2004 'winter break' parties." App. 33. The court's order also prohibited the PISD officials from causing students to feel embarrassed, uncomfortable, or fearful for exercising their legal rights, and enjoined the school officials from engaging in any further First Amendment violations. App. 33.

2. Four months after petitioners filed their lawsuit, PISD amended its student speech policy. The amended version of PISD's *Student Expression: Distribution of Nonschool Literature* broadly bans students from distributing "materials" in "classrooms" during "school hours." App. 98. The policy defines "materials" expansively to include any "writings, items, objects, articles or other materials." App. 98. It also defines "classrooms" broadly as "any location designated for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students." App. 98. The policy explains that students are prohibited from distributing materials

not only in "traditional classrooms," but also in "school campus gymnasiums, auditoriums, cafeterias, hallways, and outdoor facilities." App. 98. Finally, the policy defines "school hours" to include not just the school day but any time "when students are receiving educational instruction, participating in or attending extracurricular activities, or otherwise being involved in educational/curricular programming." App. 98.

The amended policy modifies some of the restrictions included in the earlier policy. First, it eliminates the requirement that students submit materials to the principal for pre-approval. Second, it allows all students to distribute materials "30 minutes before school and 30 minutes after school hours" at school entrances, exits, and any principal-designated "gathering areas," and permits elementary students to distribute materials during designated recess periods. Third, it allows middle and secondary students—but not elementary students—to distribute materials in hallways and cafeterias. *See* App. 99, 103.

3. In November 2005, after petitioners moved for summary judgment on their facial challenge to the constitutionality of both the initial and amended PISD student speech policies, PISD held a public hearing at which PISD officials offered "additional evidence" in support of the amended policy. App. 37-38. At the end of the hearing, the Board of Trustees re-adopted the amended policy with no substantive alterations. It added, however, a preamble that "memorialized" PISD's reasons for the policy—purportedly, "to decrease distractions, to decrease disruption, to increase the time

available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others." App. 38, 106. The preamble also noted that the additional restrictions on elementary students were "intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering." App. 110.

C. The Decisions Below

1. On February 26, 2007, the district court ruled on petitioners' motion for summary judgment on their facial challenge to the constitutionality of both the initial and amended PISD policies, as well as PISD's cross-motion for summary judgment. App. 17. With respect to PISD's initial policy, the district court—accepting the recommendation of a magistrate—found that petitioners' challenge was moot. App. 19. With respect to PISD's amended policy, the district court agreed with the magistrate that, because the restrictions were viewpoint-neutral, the Fifth Circuit's decision in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), compelled applying the standard for evaluating "time, place, and manner restrictions" on expressive conduct. App. 18. Under that standard, the district court upheld all of PISD's restrictions on student speech as facially constitutional, except one: the district court found that the categorical bar on elementary students from distributing materials in the cafeteria was overbroad. App. 19.

After the district court issued its ruling, this Court released its decision in *Morse* and the Fifth Circuit held that Justice Alito's concurring opinion was controlling. *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007). In the wake of these developments, the district court certified its judgment resolving the facial challenges to both PISD policies as final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure. App. 21. Explaining that the as-applied challenges to the PISD policies posed distinct legal questions, the district court deemed it appropriate for the Fifth Circuit to clarify the legal standard for evaluating the constitutionality of restrictions on student speech. App. 22. The district court concluded that, to further "the interest of avoiding unnecessary time and expense and the unnecessary expenditure of ... scarce judicial resources," it was appropriate for its "resolution of the distinct legal question regarding the facial constitutionality of the school district policies" to be presented to the Fifth Circuit "for resolution and decision." App. 22.

2. On December 1, 2009, the U.S. Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. App. 1. The Fifth Circuit disagreed that the facial challenge to the initial policy was moot, recognizing that petitioners sought nominal damages in addition to injunctive and declaratory relief. The Fifth Circuit remanded all claims addressing the initial policy to the district court for further proceedings.

Addressing the facial constitutionality of PISD's amended policy, the Fifth Circuit agreed

with the district court that *Tinker*—which requires that student expression must "materially and substantially disrupt the work and discipline of the school" to be suppressed—did not supply the relevant legal standard. Instead, the Fifth Circuit determined that, under its precedent in *Canady*, "intermediate scrutiny" was appropriate to determine whether content- and viewpoint-neutral restrictions on student speech comport with the First Amendment. Applying that less demanding standard of review, the Fifth Circuit upheld all of PISD's restrictions on student speech as constitutional, including the categorical ban prohibiting elementary students from distributing materials in the cafeteria (which the district court had declared overbroad). In the Fifth Circuit's view, because PISD's amended policy restrictions do not target particular content or viewpoints, it was "of no moment" that PISD policy restricted "pure speech." App. 9.

On January 5, 2010, the court of appeals denied rehearing and rehearing *en banc*. App. 15. This petition follows.

REASONS FOR GRANTING THE PETITION

This petition provides an important opportunity to reaffirm the centrality of *Tinker* to the Court's student speech jurisprudence. The decision below dilutes the First Amendment rights of students by borrowing an inapposite test and ignoring the Court's own doctrine specifically directed to speech restrictions addressed to the "time" and "place" of the school setting. In addition, this case presents a uniquely clean

vehicle to address the standard of review: the legal issue was certified below and viewed by all as critical to the outcome of the entire case. This Court has long held that First Amendment rights do not stop at the schoolhouse gate. This case presents an opportunity to make that promise a reality by reaffirming that the *Tinker* test applies to restrictions on student speech.

Three factors underscore the case for *certiorari* here. *First*, the Fifth Circuit's decision deepens a well-recognized split in authority among the lower courts over the proper standard to apply when evaluating the constitutionality of content- and viewpoint-neutral restrictions on student speech. *Second*, the Fifth Circuit's decision cannot be squared with fundamental principles of First Amendment law that have undergirded this Court's student speech jurisprudence. *Third*, the question presented addresses an important, recurring issue. If left uncorrected, the decision below threatens to wipe out any meaningful limits on school officials' ability to restrict student speech, and greatly increases the risk that school officials will employ student speech codes as a means of suppressing disfavored views on issues of religion, politics, and other matters of public opinion.

I. The Courts of Appeals Are Sharply Divided Over Whether *Tinker* Applies To Content- And Viewpoint-Neutral Restrictions On Student Speech.

The decision below exacerbates a clear and well-recognized circuit split over the proper scope of *Tinker*. In particular, there is a clear and acknowledged split of authority concerning whether

the *Tinker* standard generally governs the constitutionality of school policies that restrict student speech or whether that standard applies narrowly only to content- and viewpoint-based policies.

1. Over four decades ago, this Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. In *Tinker*, school officials adopted a facially viewpoint-neutral policy prohibiting students from wearing arm bands at school and, applying that policy, punished high school students for wearing black armbands in protest of the Vietnam War—a political statement that the Court deemed "akin to 'pure speech.'" *Id.* at 505. Evaluating whether school officials had violated the First Amendment, *Tinker* set out the standard directed to the unique context of student speech in school: "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 513). Applying that standard, the Court emphasized that wearing a black armband was "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance," and concluded that the school had violated the students' First Amendment rights. *Tinker*, 393 U.S. at 508.

In three subsequent student speech cases, the Court has elaborated on *Tinker*'s "substantial disruption" rule. In *Bethel School District No. 403*

v. Fraser, 478 U.S. 675 (1986), the Court indicated that schools may categorically suppress "lewd" or "vulgar" student speech. *Id.* at 685. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court gave schools greater leeway in addressing school-sponsored speech, allowing restrictions "reasonably related to legitimate pedagogical concerns" when student speech is sponsored by the school. *Id.* at 273. And, most recently, in *Morse v. Frederick*, 551 U.S. 393, the Court determined that schools may restrict student speech that is reasonably viewed as promoting illegal drug use. All three cases have treated the school context as unique and treated *Tinker* as stating the general rule for student speech.

2. Against this precedential backdrop, the Second, Third, Fourth, and Eighth Circuits have held that, outside the special categories of lewd or vulgar, school-sponsored, and drug-promoting speech, *Tinker* sets forth a *general rule* for assessing the constitutionality of restrictions on student speech. *See Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 761 (8th Cir. 2008); *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006); *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001). As then-Judge Alito explained in a 2001 Third Circuit decision, "[s]peech falling outside" of the narrow exceptions recognized in *Fraser* and *Hazelwood* (and now *Morse*) "is subject to *Tinker*'s general rule" and "may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214

(Alito, J.); *see also Guiles*, 461 F.3d at 325 ("for all other speech ... the rule of *Tinker* applies").

These courts view the "substantial disruption" standard as applicable to *all* student speech (so long as it is not lewd or vulgar, school-sponsored, or drug-promoting), regardless whether the restrictions are content- or viewpoint-neutral. In *Guiles v. Marineau*, for example, the Second Circuit concluded that, although *Tinker*'s facts involved school officials who were discriminating against political viewpoints, there was no reason to limit the "substantial disruption" standard to viewpoint-based restrictions on speech. 461 F.3d at 326. Instead, noting that *Tinker* is "generally applicable to student-speech cases," the Second Circuit applied the "substantial disruption" test to determine whether a school's viewpoint-neutral application of its dress code to prohibit a student from wearing an anti-war T-shirt ran afoul of the First Amendment. *Id.* at 326, 330. Other courts of appeals have employed similar reasoning in applying *Tinker* when evaluating the constitutionality of content- and viewpoint-neutral restrictions on student speech. *See Holloman v. Harland*, 370 F.3d 1252, 1276 (11th Cir. 2004) (applying *Tinker* even though student "was punished" for the viewpoint-neutral reason of "disobeying directions"); *Walker-Serrano v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003) (applying *Tinker* even though school's materials-distribution policy was content- and viewpoint-neutral).

3. In stark contrast, the Fifth, Sixth, and Ninth Circuits have held that *Tinker* is irrelevant

in most student speech cases. Instead, they have narrowly interpreted *Tinker* as setting out a heightened standard that applies only in the limited context where school officials seek to restrict student speech because of its content or viewpoint. In contrast, in the vast majority of cases when student speech restrictions can be characterized as content- and viewpoint-neutral, these courts have applied the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367 (1968). That standard has traditionally been used to evaluate time, place, and manner restrictions on expressive conduct that, unlike student speech codes, have only an incidental effect on First Amendment freedoms.

The Fifth Circuit's decision in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), is the fountainhead of this misguided line of cases. In *Canady*, the Fifth Circuit concluded for the first time that "[a]pplying the *Tinker* analysis to all other restrictions on student speech does not account for regulations that are completely viewpoint-neutral." *Id.* at 443. Although it acknowledged that "several circuits" had applied *Tinker* to cases beyond the "viewpoint-specific category," the court chose to depart from its sister circuits and apply *O'Brien*. Under *O'Brien*, a content- or viewpoint-neutral restriction on expressive conduct will be sustained under the First Amendment if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is

no greater than essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The rule adopted in *Canady* has been consistently applied in the Fifth Circuit to cases involving restrictions on student speech. *See Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004).

The Fifth Circuit's novel approach to content- and viewpoint-neutral restrictions on student speech has since spread to the Sixth and Ninth Circuits. Although both circuits at one time approached *Tinker* as a general rule applicable to all student speech, *see Barr v. Lafon*, 538 F.3d 554, 563-64 (6th Cir. 2008); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992), in more recent cases the Sixth and Ninth Circuits have aligned themselves with the Fifth Circuit's position.

In *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008), for example, the Sixth Circuit held that a school district was "entitled to put time, place, and manner restrictions on hallway speech so long as the restrictions are viewpoint neutral and reasonable in light of the school's interest." *Id.* at 847; *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391 (6th Cir. 2005) (applying *O'Brien* and rejecting *Tinker* in challenge to school dress code). Citing the Fifth Circuit's *Canady* decision, the Sixth Circuit distinguished *Tinker* as a case about efforts "to silence the student because of the particular viewpoint he expressed," and concluded that the school district "certainly need not satisfy

this demanding standard merely to impose a viewpoint-neutral regulation." *M.A.L.*, 543 F.3d at 849-50 & n.4. Similarly, in its divided opinion in *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008), the Ninth Circuit applied *O'Brien* to conclude that a school dress code comported with the First Amendment. Over a strongly worded dissent from Judge Thomas, the panel majority concluded that "applying intermediate scrutiny to school policies that effect content-neutral restrictions upon pure speech or place limitations upon expressive conduct ... strikes the correct balance between students' expressive rights and schools' interests in furthering their educational missions." *Id.* at 434; *cf. id.* at 442-43 (Thomas, J., dissenting).

3. Further confirming that the law in this area is unsettled, the Seventh Circuit appears to have taken a third path and adopted something of a hybrid approach. In *Nuxoll v. Indian Prairie School District No. 204*, 523 F.3d 668 (7th Cir. 2008), Judge Posner writing for the panel majority distinguished *Tinker* as a case about "discriminating against a particular point of view." *Id.* at 673. When the restriction is viewpoint-neutral, Judge Posner reasoned, the school need not prove that the speech it wants to suppress "would materially and substantially disrupt the work and discipline of the school." *Id.* The Seventh Circuit nonetheless applied a variant of the "substantial disruption" test—albeit a less demanding one—to the viewpoint-neutral restriction on student speech. *See id.* Concurring in the judgment, Judge Rovner criticized the panel

majority's "convoluted" distinction of *Tinker* as a case limited to viewpoint discrimination, and asserted that *Tinker*'s "substantial disruption" test "straight-forwardly" applied. *Cf. id.* at 676 (Rovner, J., concurring).

4. This split in authority is deep-seated and real. It is one that both courts and commentators have long and widely recognized as a source of serious division and ongoing confusion among the courts of appeals. *See Guiles*, 461 F.3d at 326 (acknowledging "lack of clarity in the Supreme Court's student-speech cases" over the proper standard); *Canady*, 240 F.3d at 443 (acknowledging circuit split). As commentators have explained, "[w]hether *Tinker* should be read to apply to not only viewpoint- or content-based regulations, but also to content-neutral regulations of speech is unclear" because "the circuit courts are currently divided." R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS. L. REV. 679, 712-13 (2009); Jeremiah Galus, Note, *Bong Hits 4 Jesus: Student Speech and the 'Educational Mission' Argument After Morse v. Frederick*, 71 U. PITT. L. REV. 143, 159 (2009) (the "debate continues over whether *Tinker*'s general rule applies to all student speech ... or to student speech that is subject to content-based regulations").

II. The Decision Below Cannot Be Reconciled With This Court's Student Speech Jurisprudence.

The decision below not only conflicts with decisions from other courts of appeals, but also

contravenes fundamental principles recognized in this Court's student speech jurisprudence. In failing to apply *Tinker*'s "substantial disruption" standard, the Fifth Circuit adopted a new analytical framework for evaluating restrictions on student speech that relies on an expansive interpretation of *O'Brien*, and essentially reduces *Tinker* to a narrow exception, rather than the general rule governing student speech cases.

A. The Fifth Circuit Misapplied *O'Brien*.

The Fifth Circuit's decision conflicts with this Court's statements that intermediate scrutiny does not apply where, as here, a government official seeks to regulate *pure speech* as opposed to regulating conduct that has an expressive component. The lower court's decision to apply *O'Brien* in a context where government-imposed regulations target pure student speech thus represents a significant departure from precedent.

1. In *O'Brien*, this Court carefully distinguished between government regulations that target pure speech and those addressing conduct. Expressive conduct, such as draft-card burning, the Court explained, is not entitled to the full panoply of First Amendment protections. Instead, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in *regulating the nonspeech element* can justify *incidental limitations* on First Amendment freedoms." *O'Brien*, 391 U.S. at 376 (emphases added); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (holding that a statute barring nude dancing was "justified despite

its incidental limitations on some expressive activity").

The Court has thus "limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which" the "governmental interest" is "unconnected to expression" and "unrelated to the suppression of free expression.'" *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (citation omitted). In such circumstances, the risk of impinging on First Amendment freedoms is diminished because the government is seeking to regulate the "nonspeech element" of the conduct and is only "incidentally" infringing on the "speech element." *Id.*

2. It is therefore significant that PISD's student speech policy—which is tellingly entitled *Student Expression*—is not "unconnected to expression." *Id.* To the contrary, it is all about expression. Its sweeping limitations on the distribution of any written material are directly, not just incidentally, designed to suppress pure student speech. *See Bartnicki v. Vopper*, 532 U.S. 514, 427 (2001) ("the delivery of a handbill or a pamphlet ... is the kind of 'speech' that the First Amendment protects"); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("[l]eafletting and commenting on matters on public concern are classic forms of speech that lie at the heart of the First Amendment"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (statute prohibiting distribution of campaign literature is "a regulation of pure speech"); *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (circulating a publication encouraging abortion is "pure speech"). Accordingly, because PISD officials are not seeking

to regulate the non-speech element of student conduct, but rather targeting speech itself, *O'Brien* is completely out of place.

B. The Fifth Circuit Misinterpreted *Tinker*.

The Fifth Circuit also failed to give appropriate weight to this Court's decisions specifically addressing restrictions on speech in the school context. In particular, in declining to apply *Tinker*'s "substantial disruption" standard, the Fifth Circuit placed heavy reliance on the fact that *Tinker* involved what some courts have since characterized as a viewpoint-based restriction on student speech. But cabining *Tinker* to its precise facts cannot be reconciled with this Court's subsequent precedents.

1. Although *Tinker* did not explicitly spell out its applicability to content- and viewpoint-neutral regulations, those "terms of art had not yet been used by the Supreme Court when *Tinker* was decided in 1969." *Jacobs*, 526 F.3d at 430. *Tinker*'s general applicability is nonetheless implicit in the Court's decision. In *Tinker*, school officials adopted a facially viewpoint-neutral policy that banned students from wearing any armband no matter what message the armband may have conveyed. That the policy was facially viewpoint-neutral, however, made no difference to the Court's decision. The students' free speech rights were entitled to protection even though an ad hoc reaction to anti-war armbands had been converted to a general no-armband policy. Indeed, if students' First Amendment protections were contingent on

whether the restrictions were content- and viewpoint-neutral, that would as a practical matter nullify the protections that *Tinker* recognized. The armbands in *Tinker*—which this Court has described as "[p]olitical speech ... 'at the core of what the First Amendment is designed to protect,'" 551 U.S. at 403—could be banned so long as the restriction purported to be content- and viewpoint-neutral. Likewise, the "undifferentiated fear or apprehension of disturbance" that *Tinker* deemed an impermissible basis for restricting speech, 393 U.S. at 508, could become a permissible basis for restricting speech, as long as the school district adopted a policy that is content- and viewpoint-neutral on its face. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (the "Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections") (citation omitted).

In any event, in a case decided just three years after *Tinker*—*Grayned v. City of Rockford*, 408 U.S. 104 (1972)—this Court relied on *Tinker*'s "substantial disruption" test to uphold a content- and viewpoint-neutral city ordinance prohibiting noises or diversions that tended to disturb the peace or good order of the school. Declaring *Tinker* the "touchstone" for "how to accommodate First Amendment rights with the 'special characteristics of the school environment,'" *id.* at 117 (quoting *Tinker*, 393 U.S. at 506), the Court directly analogized the speech rights of citizens *near* a school to those of students *within* a school: "in each case, expressive activity may be prohibited if it 'materially disrupts classwork or involves

substantial disorder or invasion of the rights of others.'" *Id.* at 118 (quoting *Tinker*, 393 U.S. at 513). Because the ordinance suppressed only speech that was disrupting or was about to disrupt school activities, the Court deemed the regulation consistent with the First Amendment. *Id.* at 119.

Taken together, *Tinker* and *Grayned* "teach that even when analyzing content-neutral time, place, and manner restrictions on student speech in public schools, the proper approach is to examine the restriction to determine if it furthers the purpose of preventing material and substantial disruption of the school's work and discipline." Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1037 (1995).

2. This Court's more recent student speech precedents likewise confirm that the Fifth Circuit's approach is misguided. Those precedents make clear that—unless speech falls within the special categories recognized in *Fraser*, *Hazelwood*, and *Morse*—*Tinker* applies, regardless whether the restriction on speech is content-based or content-neutral, viewpoint-based or viewpoint-neutral. *See, e.g.*, *Hazelwood*, 484 U.S. at 270-73 (*Tinker* is the test "for determining when a school may punish student expression"). Justice Alito's opinion in *Morse*, which offered the narrowest grounds for the majority's decision and is therefore controlling, *see Marks v. United States*, 430 U. S. 188, 193 (1977), unequivocally clarified that no restrictions on student speech beyond those in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, are permissible:

> I do not read the opinion to mean that there are necessarily any grounds for [student speech] regulation that *are not already recognized in the holdings of this Court*. In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; ... *Fraser* .... permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and *Hazelwood* ... allows a school to regulate what is in essence the school's own speech .... I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify *any other speech restrictions*.

Morse, 551 U.S. at 422-23 (Alito, J., concurring) (emphases added).

By refusing to apply *Tinker* to PISD's strict student speech policy, the Fifth Circuit has in effect justified restrictions on student speech not recognized in this Court's precedents. Indeed, its self-described recognition of a *fifth* (and by far the largest) category of student speech regulations—on top of *Tinker*, *Fraser*, *Hazelwood*, and *Morse*—directly contravenes this Court's instructions in *Morse*. *See* App. 6.

C. The Fifth Circuit Undervalued Student Speech.

Finally, the Fifth Circuit's decision is at odds with this Court's precedents because it fails to take

into account the special features of the school environment. Those features require protecting the educational prerogatives of school officials when student speech is lewd or vulgar, school-sponsored, or drug-promoting. But beyond that, the school environment does not justify speech codes that limit First Amendment rights unless the targeted speech can be reasonably expected to substantially disrupt school operations. This sensible rule allows schools to do their jobs while safeguarding students' rights to hold diverse views and to be free from the impositions of an official orthodoxy. *See Jacobs*, 526 F.3d at 434 (applying *Tinker* "strikes the correct balance between students' expressive rights and schools' interests in furthering their educational missions").

Rejecting this approach, the Fifth Circuit characterized *Tinker*'s "substantial disruption" standard as incompatible with the school's need to impose "time, place, and manner restrictions." App. 10. But that reasoning ignores *Tinker*'s own language. *Tinker's* "substantial disruption" standard affords school officials broad authority to impose reasonable time, place, and manner regulations on student speech: "conduct by the student, in class or out of it, which for any reason—whether it stems from *time, place, or type* of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513 (emphasis added); *Grayned*, 408 U.S. at 117-18 ("[*Tinker*] nowhere suggested that students ... [have] an absolute constitutional

right to ... unlimited expressive purposes"). *Tinker* itself is a standard specifically tailored to the time and place of the school setting. To attempt to give greater deference to neutral time, place, and manner restrictions in that setting amounts to impermissible double counting. Thus, as *Tinker* itself makes clear, time, place, and manner restrictions in the school setting are constitutional precisely to the extent they comply with *Tinker* and its substantial disruption test.

The Fifth Circuit also neglected to consider the fact that *Tinker*'s standard protects impressionable young school children by ensuring that school officials do not abuse their power by employing sweeping speech bans as a cover for inculcating students in political, religious, or social orthodoxies. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Morse*, 551 U.S. at 423–25 (Alito, J., concurring). School officials entrusted with educating our nation's children should celebrate their students' diverse views, not seek to silence them. When student speech is not disruptive, courts must be vigilant to protect against restrictions on speech. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 48 (1986) ("*Tinker* thus protects the right to speak in the halls and on the school grounds—in all the students' free time when the school is not presenting its own messages."). This Court has recognized that even young students can differentiate between messages the state allows and messages the state endorses. *See Good News Club v. Milford Cent. Sch.*, 533 U.S.

98, 118 (2001); *Board of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 252 (1990) (plurality opinion). But students can only make that distinction if the school allows room for speech it does not control. As this Court has recognized, "state-operated schools may not be enclaves of totalitarianism" and student should not "be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511.

III. This Case Presents An Ideal Vehicle For Resolving An Important, Recurring Constitutional Issue.

The issue raised in this petition is important and recurring, and the Court is unlikely to find a better vehicle to address the issue.

1. The decision below presents a clean vehicle for addressing and resolving the legal question presented. Recognizing the importance of the issue, the district court certified its decision to the Fifth Circuit, which delivered a definitive ruling on the facial constitutionality of the amended PISD policy. In upholding PISD's student speech policy, the Fifth Circuit's adoption of one legal standard over the other—*O'Brien* over *Tinker*—proved outcome-determinative. Indeed, PISD did not even argue that PISD's sweeping restrictions on student speech satisfied *Tinker*'s "substantial disruption" test.

The stakes are particularly high here because petitioners' separate, pending challenges to the facial constitutionality of PISD's earlier student

speech policy and as-applied challenge to the constitutionality of both PISD policies are bound up in the decision below. The requirement to apply *O'Brien*, instead of *Tinker*, is now binding circuit precedent, and will govern those challenges as well. As those challenges move forward, PISD has indicated that it intends to take literally one hundred depositions and engage in other litigation maneuvers that will impose significant burdens on the few families that have spoken out against the school district's anti-religious orthodoxy and stood up for students' First Amendment rights. Resolving the issues posed in the petition will avoid expending judicial resources in litigating closely related matters under an erroneous constitutional standard.

2. More broadly, the Court's intervention is warranted to arrest what, under any reasonable measure, is a broad and improper grant of authority to school officials incompatible with our educational and constitutional traditions. The outcome of this case will affect the First Amendment rights of millions of students in school districts throughout the Fifth Circuit and beyond.

As this Court has long recognized, the "vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation omitted). Public education is "the very foundation of good citizenship." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, because "schools must teach by example the shared values of a

civilized social order" and "inculcate the habits and manners of civility," *Fraser*, 478 U.S. at 681, 683, the "scrupulous protection" of student liberties is important. *Barnette*, 319 U.S. at 637 (the fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms").

Substituting *O'Brien*'s less exacting intermediate scrutiny standard for *Tinker*'s "substantial disruption" test when schools are directly suppressing speech is inimical to the responsibility of schools to prepare students for lives of engaged citizenship. Rather than being taught to value the expression of diverse ideas, the lesson for PISD students is that non-disruptive student speech may nonetheless be suppressed under the vague and flimsy guise of advancing "a focused learning environment." App. 10; *cf. Morse*, 551 U.S. at 423 (Alito, J., concurring) (rejecting claim that schools may censor student speech that interferes with their "educational mission" because such an argument could "easily be manipulated in dangerous ways"). Indeed, the Fifth Circuit upheld a policy that controls speech in every respect—physical scope, temporal scope, and the scope of proscribable materials—and amounts to a draconian set of restrictions that signal that there are no meaningful limits on school officials' ability to restrict student speech.

Permitting schools to restrict speech also opens up the serious concern that schools will use blanket restrictions on speech to discriminate against disfavored views. In this case, for instance,

petitioners filed this lawsuit because PISD officials were singling out for suppression student speech that they deemed "religious"—confiscating, among other things, pencils bearing positive religious messages; candy canes affixed to poems noting the religious origins of candy canes; and free tickets to church events in which students were participating. It would be perverse if PISD could insulate its alleged violations of religious speech by simply pointing to the viewpoint-neutral language of its policy. Religious speech is "'at the core of what the First Amendment is designed to protect.'" *Morse*, 551 U.S. at 403 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). But under the Fifth Circuit's approach, schools that wish to suppress particular viewpoints can still do just that—by passing sweeping speech bans that appear content- and viewpoint-neutral on their face. In short, *Tinker* would be reduced to a mere technicality to be circumvented through clever and ultimately more speech-restrictive policies.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 08-40707

Doug MORGAN; Robin Morgan; Jim Shell; Sunny Shell; Sherrie Versher; Christine Wade,
Plaintiffs-Appellants-Cross-Appellees,
v.
PLANO INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee-Cross-Appellant,
and
Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School; Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School,
Defendants-Appellants.

Filed Dec. 1, 2009.

Before KING, HIGGINBOTHAM and CLEMENT, *Circuit Judges.*

OPINION OF THE COURT

PATRICK E. HIGGINBOTHAM, *Circuit Judge:*

This is a First Amendment challenge to the facial validity of school rules for student distribution of written materials.

I

Four families with students in Plano Independent School District schools allege that over a three-year period students were not permitted to distribute various religious materials, including pencils inscribed with "Jesus is the reason for the season," candy canes with cards describing their Christian origin, tickets to a church's religious musical programs, and tickets to a dramatic Christian play, this by a policy then in effect and captured by a 2004 version of the District rules. While this suit was pending, the District adopted a new policy, referred to as the 2005 Policy. It permits distribution of materials during: (1) 30 minutes before and after school; (2) three annual par-ties; (3) recess; and (4) school hours, but only passively at designated tables. Students are generally prohibited from distributing material at all other times and places.[1] In addition, middle and secondary school students are permitted to distribute materials in the hallways during non-instructional time and in the cafeterias during non-instructional time and designated lunch periods. The 2005 Policy also contained narrow limitations on the content of materials that may be distributed.[2]

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[1] The 2004 Policy was more restrictive, requiring any materials to first be submitted for prior review by the principal.

[2] The Policy bans materials that (1) are obscene, vulgar, or otherwise age-inappropriate; (2) endorse actions endangering

At a public hearing the school board heard testimony from various employees regarding its necessity. Following this hearing, the District "re-adopted" the 2005 Policy, adding a preamble detailing its justifications for enacting it. The preamble states, in relevant part, that the Policy is "intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others" and that the additional restrictions on elementary students are "intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering."

II

With the new policy in effect, plaintiffs moved for a summary judgment that the policies are facially invalid. Accepting a magistrate judge's recommendation, the district court found the facial challenge to the 2004 Policy to be moot because no evidence suggested that the District would revert to a policy it had replaced with another. Turning to the facial validity of the 2005 Policy, the magistrate judge, relying on *Canady v. Bossier Parish School*

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the health or safety of students; (3) advocate violation of school rules; (4) advocate imminent lawlessness; (5) contain hate speech; and (6) reasonably could result in "material and substantial interference with any school education and/or curricular related activity or that block[ ] or impede[ ] the safe flow of traffic within hallways and entrance or exit ways of the school."

Board,[3] applied the *O'Brien* test for content and viewpoint neutral restrictions, concluding that it was narrowly tailored to achieve the significant governmental interest of "improving the educational process,"[4] while leaving open ample alternative channels of communication. The district court adopted the magistrate judge's report and recommendation except as it related to the provision in the 2005 Policy prohibiting distribution of materials during elementary school lunch periods. The district court concluded that "this provision reaches more broadly than is reasonably necessary to protect [the District's] legitimate interests."

Plaintiffs here challenge the finding of mootness and the finding that the 2005 Policy is facially valid.[5] The school district cross appeals the finding regarding the elementary school cafeteria policy. We

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[3] 240 F.3d 437 (5th Cir. 2001) (applying to school uniforms the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

[4] *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001).

[5] The district court certified its judgment regarding the facial validity of both policies as final and appealable under Rule 54(b). The court found the facial and as-applied challenges to be distinct claims and that the facial challenges posed distinct legal questions. We acknowledge that there are different burdens attending an as-applied challenge, but note that regardless of our disposition of this matter, the plaintiffs will continue to litigate the constitutionality of the District's rules. While deferring to the judgment of the district court, we remain dubitante over the efficiency of separating the claims into separate appeals, an effort further complicated by the later denial of qualified immunity to individual defendants. The effort to confect an efficient appeal is commendable in concept although here perverse in execution.

conclude that the 2005 Policy is facially constitutional and hold that the challenge to the facial validity of the 2004 Policy is not moot. We will remand the claim of facial invalidity of the 2004 Policy so it can first be addressed by the district court with its resolution of the as-applied challenge to that policy, which is not before us.

Defendants Lynn Swanson and Jackie Bomchill, Principals at Thomas Elementary School and Rasor Elementary School, urge that the First Amendment does not apply to elementary school students. They and their argument are not before us. While this appeal was pending, the district court denied their separate motion to dismiss based on qualified immunity. That appeal is proceeding.[6]

III

We review a district court's judgment on cross motions for summary judgment de novo,[7] addressing each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.[8] We will affirm only if there is no genuine issue of material fact and the party is entitled to prevail as a matter of law.[9]

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[6] *Morgan v. Swanson*, No. 09-40373 (5th Cir. appeal docketed Apr. 7, 2009).

[7] *White Buffalo Ventures, LLC v. Univ. of Tex.*, 420 F.3d 366, 370 (5th Cir. 2005).

[8] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001).

[9] *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 539 (5th Cir. 2004).

IV

The district court found the 2005 Policy to be facially valid under *United States v. O'Brien*,[10] rejecting plaintiffs' contention that the case is controlled by the standard of *Tinker v. Des Moines Independent School District*-that restrictions be "necessary to avoid material and substantial interference with schoolwork or discipline."[11]

We have made plain that "time, place, and manner" is the proper standard for evaluating content and viewpoint neutral regulations of student speech[12] and that when a school imposes content or viewpoint based restrictions the court will apply *Tinker*.[13] In *Canady v. Bossier Parish School Board*, we reaffirmed that there were four (arguably now five after *Morse*) categories of student speech and that "the level of scrutiny applied to regulations of student expression depends on the substance of the message, purpose of the regulation, and the manner in which the message is conveyed."[14] The first four categories are various content based designations drawn from the *Tinker*

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[10] 391 U.S. at 367, 88 S.Ct. 1673.

[11] 393 U.S. 503, 511, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

[12] *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 507-09 (5th Cir. 2009); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442-43 (applying the O'Brien standard and noting that it was "virtually the same standard[ ]" as the traditional time, place, and manner analysis).

[13] *Id.*

[14] *Id.* at 441-42.

line,[15] making essentially the same inquiry: whether, "in light of the special characteristics of the school environment,"[16] the school may impose content or viewpoint based regulations on student speech. The last category of restrictions, the one at issue in *Canady*, includes those that are content and viewpoint neutral.[17]

Canady viewed *O'Brien* as an application of the time, place, and manner standard.[18] The Supreme Court has recognized their virtual equivalence.[19] By this measure, a regulation must be content and viewpoint neutral, and must be "narrowly tailored

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15 *Tinker*, 393 U.S. at 503, 89 S.Ct. 733;*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (holding schools may prohibit lewd, vulgar, obscene or plainly offensive student speech), *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (holding schools could regulate school sponsored speech such as student publications if "their actions are reasonably related to legitimate pedagogical concerns"); *Morse v. Frederick*, 551 U.S. 393, 422, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (Alito, J., concurring) (holding that schools may regulate speech "that a reasonable observer would interpret as advocating illegal drug use" and that could not be "interpreted as commenting on any political or social issue").

16 *Tinker*, 393 U.S. at 506, 89 S.Ct. 733.

17 *Canady*, 240 F.3d at 442-43. We recently reiterated the applicability of this standard to content and viewpoint neutral restrictions in Palmer, 579 F.3d at 507-09.

18 *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

19 *Clark*, 468 U.S. at 298, 104 S.Ct. 3065 (stating that the test in *O'Brien* "in the last analysis is little, if any, different from the standard applied to time, place or manner, restrictions"); *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (reaffirming *Clark*).

to serve a significant government interest, and ... leave open ample alternative channels for communication of the information."[20] The regulation need not be the least restrictive alternative, but it must avoid burdening substantially more speech than is necessary to achieve the government's interest.[21]

Plaintiffs argue that the *O'Brien* standard only applies to expressive conduct and not to "pure speech"; that because distributing written materials is "pure speech," the *Tinker* "substantial disruption" test must apply. We are unpersuaded that the *O'Brien* standard, or a nigh-equivalent time, place, and manner standard, is so limited. The Supreme Court has twice applied the test we apply here to leafleting or distribution of written materials. In *Heffron v. International Society for Krishna Consciousness, Inc.*, the Court upheld a regulation preventing Hare Krishnas from distributing their literature at a state fair outside of specifically assigned booths.[22] The Court found that the state interest in orderly movements of the crowd was significant and that the regulation was narrowly tailored to meet that end. Likewise, in *Hill v. Colorado*, in evaluating a restriction on the distribution of handbills (as well as making oral statements and displaying placards) near health

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20 *Ward*, 491 U.S. at 791, 109 S.Ct. 2746;see also *Hill v. Colorado*, 530 U.S. 703, 725-26, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

21 *Ward*, 491 U.S. at 790-91, 109 S.Ct. 2746.

22 452 U.S. at 654, 101 S.Ct. 2559.

care facilities, the Court asked whether the restrictions were "narrowly tailored to serve a significant government interest" and found them valid.[23] Both of these cases address regulation of what is urged here to be "pure speech." As we understand it, the logic of the argument would confine the time, place, and manner standard to regulations of "quintessential public forums" such as sidewalks;[24] requiring the state to clear the higher burden of a "substantial disruption" when regulating students. We must disagree. *Tinker* is triggered by content or viewpoint regulation. That "pure speech" is being regulated is here of no moment.

Morse v. Frederick is not contrary. Nor did Justice Alito's[25] observation that he did not understand the majority opinion "to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this court" mean that regulations of student speech could only be upheld if they met the strictures of *Tinker*, *Fraser*, *Hazelwood*, *Morse* and that no other First Amendment doctrine would apply. That contention cannot survive a plain reading. Its thrust is to cabin justifications of content or viewpoint based restrictions, reminding that reciting the mantra of a school's "educational mission" is insufficient. *Morse* did not involve, and

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23 *Hill*, 530 U.S. at 710 & 713 n. 19, 120 S.Ct. 2480.

24 *Id.* at 715, 120 S.Ct. 2480.

25 We have held Justice Alito's concurrence to be the controlling opinion in *Morse*. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007).

Justice Alito's writing did not address, content or viewpoint neutral restrictions.[26] The statement that "any argument for altering the usual free speech rules in the public schools ... [must] be based on some special characteristic of the school setting" implicitly recognizes that the generally applicable free speech rules (such as the allowance of time, place, and manner restrictions) continue to apply.

V

Applying the time, place, and manner test, we conclude that the District's 2005 Policy is reasonable and facially constitutional: the regulations at issue are content neutral[27] and the District has a significant legitimate interest that is furthered by the regulations. The regulations are aimed at providing a focused learning environment for its students.[28] The regulation of speech during and immediately before the classroom instructional period is intended to facilitate the beginning of class without a wait for the distribution of materials. Similarly, restrictions on distribution of materials by elementary students in hallways and the cafeteria are intended to facilitate the movements of students between classes and at lunch and to reduce littering. We have here more than invocations of an

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26 *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 508 (5th Cir. 2009) (" Morse, ... did not concern content-neutral regulations.")

27 The content based restrictions are not at issue in this appeal.

28 See *Canady*, 240 F.3d at 443 ("Improving the educational process is undoubtedly an important interest of [the school board].").

abstract educational mission. The District's rationales were supported by an affidavit of the deputy superintendent and testimony by teachers at the 2005 hearing that these are a positive response to the types of incidents causing disruption in the past.[29]

Less clear is whether the District's policy is narrowly tailored to meet the District's interest and whether there are ample alternative channels of communication. While upholding most of the policy, the district court found the prohibition on distribution of materials in the elementary school cafeteria to be unreasonable-an inapt targeting of its objectives. We conclude that the policies as written are sufficiently narrowly tailored and are constitutional, at least on our invocation of "avoidance." Steering clear of constitutional shoal water, we read the term "distribution" to mean distribution of multiple items to multiple individuals and accept the District's further narrowing that it would not in any event reach the passing of a single note or book so long as it is not during time set aside for classroom instruction.[30]

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29 For instance, one teacher testified that the first few moments of class often deter-mine the success of the rest of class. Pre-venting distractions in the moments before instructional periods begin is important to ensuring that the instructional periods begin and run smoothly.

30 "In evaluating a facial challenge to state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered." *Ward*, 491 U.S. at 796, 109 S.Ct. 2746 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)); *Grayned v. City of*

The policies provide ample alternative channels of communication. All students may distribute materials before and after school, during recess and passively during school hours at designated tables. Moreover, middle school and secondary school students are permitted to distribute materials in the hallways and in the cafeterias during noninstructional time. While this freedom for the upper level students is not extended to distribution of materials within the classroom before instruction begins, the least restrictive regulation is not required. These are ample alternative channels of communication.

We turn to the claim that the restrictions on distribution by elementary school students in the cafeteria are invalid.[31] The District presented evidence that elementary school lunchrooms are heavily controlled yet near chaotic places where school administrators struggle to ensure that young students are able to take lunch in a limited period of time, and that elementary school students are not as mature and require more guidance than older students in order to ensure that they are able to move through the cafeteria quickly and efficiently.

As for impermissibly reducing alternative channels of communication, just like middle and secondary school students, elementary school students may still distribute written material before

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Rockford, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[31] We do not reach the question whether similar restrictions would be acceptable if imposed on middle or secondary school students. As a matter of common sense, as students become older and more self-sufficient the need for restrictions lessens.

and after school as well as at recess. A student has several opportunities to distribute materials throughout the day. The alter-natives for communication are fulsome. This time, place, and manner regulation serves the powerful interests of the school in maintaining order and discipline, essential both to its duty to teach and the protected freedom of its students to speak. So construed, the very balance simultaneously teaches and protects the student. We find that the 2005 Policy is facially constitutional.

VI

The district court, accepting the magistrate's recommendation, found that, as the District was unlikely to return to the 2004 Policy, the request for injunctive and declaratory relief was moot. This is sound but it leaves aside plaintiffs' claim of nominal damages from the 2004 Policy. This court and others have consistently held that a claim for nominal dam-ages avoids mootness.[32] Given that

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[32] See *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 601-03 (5th Cir. 2004) (recognizing *Ward v. Santa Fe Indep. Sch. Dist.*, 35 Fed.Appx. 386 (5th Cir. 2002) (per curiam) (reversing earlier judgment that claim for nominal damages did not avoid mootness and holding that a claim for nominal damages was sufficient)); see also *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (holding a plaintiff could seek nominal damages in the absence of other damages for an alleged constitutional violation under § 1983); *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986) (same); 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3533.3 (3d ed. 1998) ("A valid claim for nominal damages should avoid mootness."). This view is supported by our sister circuits. See Van Wie v. Pataki, 267

the plain-tiffs will pursue their as-applied claim regardless of whether the 2004 Policy is found to be facially constitutional, we decline to address its merits with-out prior examination by the district court. We there-fore remand all claims addressing the 2004 Policy to the district court for further proceedings.[33]

The district court's judgment is AFFIRMED in part and REVERSED in part.

F.3d 109, 115 n. 4 (2d Cir. 2001) (holding a claim for nominal damages avoids mootness); *Doe v. Delie*, 257 F.3d 309, 314 (3d. Cir. 2001) (same); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n. 5 (4th Cir. 1983) (same); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981) (same); Bernhardt v. County of L.A., 279 F.3d 862, 871 (9th Cir. 2002) (same); *Utah Animal Rights Coalition v. Salt Lake City Co.*, 371 F.3d 1248 (10th Cir. 2004) (same). However, this rule has been challenged as "inconsistent with fundamental principles of justiciability." See *Utah Animal Rights Coalition*, 371 F.3d at 1263 (2004) (McConnell, J., concurring).

33 We note that to the extent that the only remaining relief the plaintiffs seek are nominal damages, a judgment awarding nominal damages would settle the matter, see Santa Fe Indep. Sch. Dist., 393 F.3d at 603, and doing so would not necessarily make plaintiffs prevailing parties entitled to attorney's fees. See *Buckhannon Bd. and Care Home v. W. Va. Dept. of Health and Human Resources*, 532 U.S. 598, 604 n. 6, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (citing *Farrar v. Hobby*, 506 U.S. 103, 115-16, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)).

Appendix B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 08-40707

Doug MORGAN; Robin Morgan; Jim Shell; Sunny Shell; Sherrie Versher; Christine Wade,
Plaintiffs-Appellants-Cross-Appellees,
v.
PLANO INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee-Cross-Appellant,
and
Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School; Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Texas, Sherman Division

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Before KING, HIGGINBOTHAM, and CLEMENT, *Circuit Judges.*

PER CURIAM

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the

panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham

United States Circuit Judge

Filed: January 5, 2010

Appendix C

UNITED STATES DISTRICT COURT, E.D. TEXAS, SHERMAN DIVISION

No. 4:04CV447.

Jonathan MORGAN, et al.,
Plaintiffs,

v.

THE PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants.

MEMORANDUM ADOPTING IN PART AND MODIFYING IN PART REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

SCHELL, J.

Came on for consideration the above-referenced civil action, this court having heretofore ordered this case be referred to the United States Magistrate Judge for all pretrial purposes.

The report of the United States Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of "Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies)" [Doc. No. 27], "Defendant Plano Independent School District's ("PISD") Cross Motion for Summary Judgment"

[Doc. No. 53], "Plano ISD's Objections to Plaintiffs' Evidence Attached to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment (Facial Challenge to Plano ISD Policies)" [Doc. No. 66], "Plaintiffs' Motion for Leave to Submit Additional Plano ISD Board Policy in Opposition to Arguments Raised in Plano ISD's Combined 1) Sur-reply to Plaintiffs' Reply to Plano ISD's Response to Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and 2) Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment" [Doc. No. 77], "Defendant's Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply to Plano ISD's Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment" [Doc. No. 84], "Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence" [Doc. No. 94], "Motion to Substitute Affidavit of David Morgan Attached to Document No. 78" [Doc. No. 119], and "Defendants' Objection to the Substitute Affidavit of Doug Morgan Attached to Document Number 78" [Doc. No. 121] have been presented for consideration.

The court having made a *de novo* review of the objections raised by Plaintiffs and Defendant PISD thereto, is of the opinion that the Magistrate Judge correctly applied the four categories of school speech in the Fifth Circuit as stated in *Canady v. Bossier Parish School Board*, 240 F.3d 497, 443 (5th Cir. 2001). Specifically, the Magistrate Judge correctly found that the 2005 Policy's regulations on speech were viewpoint neutral, and therefore, correctly applied the test for time, place and manner restrictions to the 2005 Policy.

The court also finds the Magistrate Judge's findings of fact and conclusions of law were correct with respect to the 2004 Policy and with respect to the 2005 Policy as it relates to the middle school and high school students. However, the court finds that the 2005 Policy as it relates to elementary students is overbroad with respect to the following provision:

4. District elementary school cafeterias, during designated meal periods, are provided for the limited purpose of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the cafeteria, students may not distribute materials in elementary school cafeterias during designated meal periods.

The court finds that this provision reaches more broadly than is reasonably necessary to protect PISD's legitimate interests. Accordingly, the Report and Recommendation of the United States Magistrate Judge is hereby modified to grant in part Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and to deny in part Defendant Plano Independent School District's ("PISD") Cross Motion for Summary Judgment as it pertains to this provision of the 2005 Policy.

The court finds that the remaining objections of Plaintiffs and the objections of Defendant PISD are without merit. Therefore, the court hereby adopts the findings and conclusions of the Magistrate

Judge, as modified herein, as the findings and conclusions of this court. It is, therefore,

ORDERED that the Magistrate Judge's Report is ADOPTED, as modified, as the opinion of the Court. It is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) is GRANTED IN PART AND DENIED IN PART, and Defendant Plano Independent School District's Cross Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART.

SIGNED this 26th day of February, 2007.

/s/ Richard A. Schell

United States District Judge

Appendix D

UNITED STATES DISTRICT COURT, E.D. TEXAS, SHERMAN DIVISION

No. 4:04CV447.

Jonathan MORGAN, et al.,
Plaintiffs,

v.

THE PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants.

ORDER GRANTING MOTION TO CERTIFY COURT ORDER AS FINAL

On this day the court heard and considered Plaintiffs' and Defendant, Plano Independent School District's, motion pursuant to Rule 54(b) to certify the court's Order dated February 26, 2007 (Dkt. 132) as a final and appealable Order of the court. On February 26, 2007, (Dkt. 132), the court adopted in part and denied in part Plaintiffs' and Defendant's cross motions for summary judgment relating to the facial challenge to the school districts policies. After the court's order, the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit decided two cases. *Deborah Morse, et. al v. Joseph Frederick*, 127 S. Ct. 2618 (June 25, 2007); and, *Enrique Ponce, Jr. v. Socorro Independent School District*, 508 F.3d 765

(5th Cir. 2007). The parties disagree concerning the applicability of these decisions to the court's Order (Dkt. 132).

In the interest of avoiding unnecessary expense for the parties and the unnecessary use of the court's scarce judicial resources, and because there is no reason for delay, the court, under Federal Rule of Civil Procedure 54(b), hereby to certifies the court's February 26, 2007 (Dkt. 132) Order as a Final Judgment on the separate and distinct issues presented in that Order.

The court finds that this action presents more than one distinct claim, including the claim regarding the facial constitutionality of the school district's policies on which the court has made its final decision in the Order dated February 26, 2007 (Dkt. 132), and that there is no just reason for delay in entering a Final Judgment as to that distinct and separate claim. The court further finds that in the interest of avoiding unnecessary time and expense and the unnecessary expenditure of the scarce judicial resources of the court, this court's resolution of the distinct legal question regarding the facial constitutionality of the school district policies should be made a Final Judgment so that these distinct legal questions may be presented to the United States Court of Appeals for the Fifth Circuit for resolution and decision.

The court directs the entry of a Final Judgment as to the claims decided in the court's February 27, 2007 Order (Dkt. 132), and expressly determines that there is no just reason to delay appellate review and that the claims decided in the February 27, 2007 Order (Dkt. 132) are distinct claims for

relief regarding the facial constitutionality of the school district's policies, and are distinct from the claims related to the as-applied analysis and the claims related to the individual Defendants. The court further finds that a decision by the United States Court of Appeals for the Fifth Circuit as to the applicable law will reduce the time for trial and will give the court and the parties direction as to the correct law that should be applied.

IT IS SO ORDERED.

SIGNED this the 30th day of June, 2008.

/s/ Richard A. Schell

United States District Judge

Appendix E

**UNITED STATES DISTRICT COURT,
E.D. TEXAS, SHERMAN DIVISION**

No. 4:04CV447.

Jonathan MORGAN, et al.,
Plaintiffs,

v.

The PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants.

Jan. 30, 2007

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (FACIAL CHALLENGE TO PISD POLICIES) AND GRANTING DEFENDANT PLANO ISD'S CROSS MOTION FOR SUMMARY JUDGMENT

DON D. BUSH, *United States Magistrate Judge.*

On this day came on for consideration Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 27] and Defendant Plano Independent School District's ("PISD") Cross Motion for Summary Judgment [Doc.

No. 53]. On May 18, 2006, the court directed the parties to send a letter to the court listing all the documents the court should consider in deciding the cross motions for summary judgment. By letter dated May 18, 2006, Defendants notified the court of all the documents it believed the court should consider in resolution of the motions. Plaintiffs sent two letters to the court on May 19, 2006, notifying the court of the documents it should consider in the resolution of these motions. Based on these letters, the court considered the following documents in deciding these motions:

1) Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 27].

2) Defendant PISD's Response to Plaintiffs' Motion for Partial Summary Judgment [Doc. No. 38].

3) Brief of *Amicus Curiae* Texas Association of School Boards Legal Assistance Fund in Support of Defendant PISD's Cross Motion for Summary Judgment [Doc. No. 48].

4) Order Granting Leave to File Brief of *Amicus Curiae* [Doc. No. 50].

5) Defendant PISD's Cross Motion for Summary Judgment [Doc. No. 53].

6) Plaintiffs' Reply to PISD's Response to Plaintiffs' Partial Motion for Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 54].

7) Plaintiffs' Response to Defendant PISD's Cross Motion for Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 59].

8) Plano ISD's Objections to Plaintiffs' Evidence Attached to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment (Facial Challenge to Plano ISD Policies) [Doc. No. 66].

9) Plano ISD's Combined 1) Sur-reply to Plaintiffs' Reply to Plano ISD's Response to Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and 2) Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment [Doc. No. 75].

10) Plaintiffs' Motion for Leave to Submit Additional Plano ISD Board Policy in Opposition to Arguments Raised in Plano ISD's Combined 1) Sur-reply to Plaintiffs' Reply to Plano ISD's Response to Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and 2) Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment [Doc. No. 77].

11) Plaintiffs' Sur-Reply to PISD's Reply-to Plaintiffs' Response to PISD's Cross Motion for Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 78].

12) Defendant's Response to Plaintiffs' Motion for Leave to Submit Additional Plano ISD Board Policy [Doc. No. 83].

13) Defendant's Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply to Plano ISD's Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment [Doc. No. 84].

14) *Amicus Curiae* Brief of United States Senator John Cornyn in Support of Plaintiffs'

Motion for Partial Summary Judgment [Doc. No. 86].

15) Order Granting Plaintiffs' Motion for Leave and Supplementation of the Summary Judgment and Cross Summary Judgment Evidentiary Record with PISD Administrative Regulation 043910 [Doc. No. 87].

16) Plaintiffs' Combined Response to Defendant PISD's Objections to the Affidavit of Doug Morgan and Plaintiffs' Motion to Withdraw and Substitute Affidavit [Doc. No. 89].

17) Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 94].

18) Plaintiffs' Response to Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 98].

19) Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 100].

20) Plaintiffs' Sur-Reply to Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 102].

21) Notice of Submission of Correspondence for Filing as Part of the Record [Doc. No. 106].

22) Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Partial Summary Judgment on the Facial Challenge to the PISD Distribution Policies [Doc. No. 115].

23) Defendants' Response to Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Partial Summary Judgment on the Facial Challenge to the Plano ISD Distribution Policies [Doc. No. 116].

24) Supplement to Doc. No. 78 Plaintiffs' Sur-Reply to Plano ISD's Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment [Doc. No. 117].

25) Motion to Substitute Affidavit of David Morgan Attached to Document No. 78 [Doc. No. 119].

26) Order Granting Plaintiffs' Motion to Substitute Affidavit of Doug Morgan Attached to Document Number 78 [Doc. No. 120].

27) Defendants' Objection to the Substitute Affidavit of Doug Morgan Attached to Document Number 78 [Doc. No. 121].

Having considered these documents, the court is of the opinion that Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) should be DENIED, and Defendant PISD's Cross Motion for Summary Judgment should be GRANTED.

PRELIMINARY MATTERS

Initially, the court will resolve several motions that are relevant to the resolution of the cross motions for summary judgment.

Plano ISD's Objections to Plaintiffs' Evidence Attached to Plaintiffs' Response [Doc. No. 66].

Defendant PISD objects to the attachment of a Dallas Morning News website article to the Affidavit of Doug Morgan because it is hearsay and contains numerous hearsay statements. This objection is sustained.

PISD also objects to the statements in Paragraphs 2-4 of Hiram S. Sasser III's affidavit as overly vague, non-specific and conclusory. This objection is overruled.

Finally, PISD objects that Paragraph 4 of Mr. Sasser's affidavit purports to make a statement of law, for which the affidavit establishes no foundation or competency for him to make. This objection is sustained.

1) *Defendants' Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment [Doc. No. 84];* and

2) *Plaintiffs' Combined Response to Defendants' Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply And Plaintiffs' Motion to Withdraw Affidavit of Doug Morgan and to Substitute Amended Affidavit [Doc. No. 89]*

PISD objects to paragraph 8 of the Affidavit of Doug Morgan because the minutes referenced in the affidavit are not attached to the affidavit and the minutes themselves are the best evidence of the contents of the minutes. PISD objects to paragraph 9 of Mr. Morgan's affidavit because the allegations contained therein are irrelevant to the issues related to the facial constitutionality of the distribution policies at issue. In response, Plaintiffs' wish to withdraw their original affidavit and submit

an amended affidavit to which the minutes are attached. The Motion to Withdraw the Affidavit of Doug Morgan and to Substitute Amended Affidavit [Doc. No. 89] is granted. However, the Amended Affidavit of Doug Morgan is insufficient summary judgment evidence in that it fails to direct the court to any particular part of the attached minutes. It also fails to even identify what the minutes contain or do not contain.[1]

Paragraph 9 of the Amended Affidavit of Doug Morgan is substantively the same as paragraph 9 of the original Affidavit of Doug Morgan. Therefore, PISD's relevancy objection is not moot and should be considered. Paragraph 9 of Mr. Morgan's amended affidavit does not provide summary judgment evidence that is relevant to the facial constitutionality of PISD's distribution policies. Paragraph 9 and the attachment it references go to the application of the policies by Principal Swanson. Accordingly, PISD's objection to Paragraph 9 is sustained.

Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 94]

PISD seeks leave to supplement its summary judgment evidence with, among other items, a transcript from the PISD public school board meeting held on November 1, 2005. During this meeting the PISD Board of Trustees heard

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[1] Local Rule CV-56(c) provides that the court will not "scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial before entering summary judgment."

testimony from eleven educators on subjects relevant to the time, place, and manner restrictions set out in PISD's April 2005 Distribution Policy. For the most part, Plaintiffs' response to this motion addresses whether the evidence meets the standards set out in *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); however, whether the *Tinker* standard is the appropriate standard in this case is a disputed issue in the cross motions for summary judgment. Plaintiffs also argue that the evidence is not relevant. The court is of the opinion the evidence is relevant to the facial constitutionality of PISD's distribution policies.

Further, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Supreme Court stated that if a plaintiff succeeds in raising doubt about the theory upon which a regulation is based, the burden then falls on the municipality, or PISD here, to "supplement the record with evidence renewing support for the theory that justifies the ordinance." And because PISD can justify its policies based on evidence developed prior to the adoption of the policies as well as evidence adduced at trial, it follows that Plano can justify its policies based on evidence developed prior to the adoption of its current policy, which is substantively identical to the April 2005 Policy. *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 175 (5th Cir. 2003). Finally, Plaintiffs will not be heard to complain about the timeliness of the supplemental evidence. Plaintiffs themselves have continued to file documents for the court's consideration in the resolution of these cross motions for summary

judgment on the facial constitutionality of the up until and including July of 2006. And Plaintiffs have failed to show that they will be prejudiced by PISD's delay in submitting this evidence. Accordingly, Defendant PISD's Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 84] is granted.

Defendants' Objection to the Substitute Affidavit of Doug Morgan Attached to Document Number 78 [Doc. No. 121]

The court granted Plaintiffs' Motion to Substitute Affidavit of David Morgan Attached to Document No. 78 on July 24, 2006. While PISD did not object to the filing of the substitute affidavit to correct a typographical error, it raised objections to the substance of the substitute affidavit. PISD objects to paragraph 8 of the substitute affidavit because the minutes referenced in the paragraph are not attached to the affidavit and the minutes themselves are the best evidence of their content. This objection is sustained.

PISD also objects to paragraph 9 of the substitute affidavit because the allegations contained therein are irrelevant to the issues related to the facial constitutionality of the distribution policies. As the court previously found with respect to an identical paragraph in Mr. Morgan's Amended Affidavit, paragraph 9 of Mr. Morgan's affidavit does not provide summary judgment evidence that is relevant to the facial constitutionality of PISD's distribution policies. Paragraph 9 and the attachment it references go to the application of the policies by Principal Swanson.

Accordingly, PISD's objection to Paragraph 9 is sustained.

BACKGROUND

On December 15, 2004, Plaintiffs filed Plaintiffs' Original Complaint requesting a temporary restraining order, preliminary and permanent injunctive relief, declaratory judgment, nominal damages, and attorney's fees and costs for constitutional violations. Plaintiffs also filed an Application for Temporary Restraining Order. On December 16, 2004, the court held a hearing on Plaintiffs' Application for Temporary Restraining Order at which the court granted Plaintiffs' application and issued a Temporary Restraining Order. The Temporary Restraining Order prohibited Defendants from "interfering with or prohibiting Plaintiffs and other students from distributing religious viewpoint gifts to classmates at the December 17, 2004 'winter break' parties at Plano Independent School District ...." The Temporary Restraining Order also prohibited Defendants from interfering with or prohibiting Doug and Robin Morgan from distributing religious viewpoint gifts to parents at the winter break parties and prohibited Defendants from deliberately causing students to feel embarrassed, uncomfortable or fearful because of a student's exercise of a legal right.

The distribution policy in effect when this law suit was initiated was a version of the GNAA(LOCAL) (the "2004 Policy").[2] On April 4,

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[2] The relevant portions of the 2004 Policy provide:

2005, the PISD Board of Trustees adopted and enacted a new version of FNAA(LOCAL) (the "April 2005 Policy"),[3] which replaced the 2004 Policy. On

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The District's classrooms during the school day are provided for the limited purpose of delivering instruction to students in the courses and subjects in which they are enrolled. Hallways in school buildings are provided for the limited purpose of facilitating the movement of the students between classes and allowing access to assigned lockers. Classrooms and hallways shall not be used for the distribution of any materials over which the school does not exercise control.

Each school campus shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed. Campus principals may develop reasonable time, place, and manner restrictions regarding the distribution of materials to designated areas.

All written material over which the school does not exercise control and that is intended for distribution shall be submitted to the building principal or designee for prior review according to [specific] procedures.

[3] The relevant portions of the April 2005 and November 2005 Policies provide:

1. "Classroom" is defined as any location designated for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. In addition to traditional classrooms, the term "classroom" includes, but is not limited to, school campus gymnasiums, auditoriums, cafeterias, hallways and outdoor facilities ...

2. Elementary, middle, and secondary campuses have different distribution policies and guidelines due to the age/maturity of students and the highly structured learning environment of elementary campuses. "Elementary" campuses are defined as campuses designated for students up to fifth

grade. "Middle" and "secondary" campuses are defined as campuses designated from sixth grade through twelfth grade.

DISTRIBUTION ON ELEMENTARY CAMPUSES BY STUDENTS

Elementary campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving the curricular objectives and/or state-mandated learning requirements. The following regulations apply to the distribution of materials between elementary students while on elementary campus, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Students may distribute material 30 minutes before school and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas to be designated by the principal.

2. Distribution of materials is not permitted in the classroom during school hours with the exception of during the three annual parties designated by the District.

3. District elementary school hallways during school hours are provided for the limited purpose of facilitating the safe, organized, and structured movement of students between classes and allowing access to assigned lockers providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the hallways, students may not distribute materials in elementary school hallways during school hours.

4. District elementary school cafeterias, during designated meal periods, are provided for the limited purpose of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline.

Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the cafeteria, students may not distribute materials in elementary school cafeterias during designated meal periods.

5. Students may distribute materials during designated recess periods.

6. Students may leave materials on the "distribution table" and/or any other such designated area so others may obtain a copy. Each school campus principal shall designate an area where materials may be available or distributed.

7. Students may distribute materials during the three annual parties designated by the District.

8. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.

9. Students may distribute materials in areas not addressed by this policy subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein ...

DISTRIBUTION ON MIDDLE AND SECONDARY CAMPUSES BY STUDENTS

Middle school and secondary school campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state-mandated learning requirements. The following guidelines apply to distribution of materials between middle and secondary school students while on middle and secondary campuses, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Subject to the restrictions herein, students may distribute materials 30 minutes before school hours and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas shall be designated by the principal.

2. Distribution of materials is not permitted in the classrooms during school hours.

3. Middle and secondary students may distribute materials in middle and secondary school hallways during noninstructional times during school hours.

4. Middle and secondary students may distribute materials in middle and secondary campus cafeterias during designated lunch periods and noninstructional time.

5. Students may leave materials on the "distribution table" and/or any other designated area so that others may obtain a copy. Each school campus principal shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed.

6. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.

7. Students may distribute materials in areas not addressed by this policy, subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein....

"Limitations on Content" include materials that are obscene, vulgar or otherwise inappropriate for the age and maturity of the audience; materials that endorse actions endangering the health or safety of the students; materials that advocate violation of school rules and fall within the legal standard found in the FNAA (LEGAL) policy; materials that advocate imminent lawless or disruptive action and are likely to incite or produce such action; materials that include hate literature that scurrilously attacks ethnic, religious, or racial groups and similar publications aimed at creating hostility and violence if they fall within the standard described in FNAA (LEGAL); and materials about which there is reasonable cause to believe would result in material and substantial interference with any school education and/or curricular related activity that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.

November 1, 2005, the PISD Board of Trustees conducted a public meeting at which it heard additional evidence in the form of the testimony of eleven educators regarding aspects of education related to the school's distribution policy. After hearing this testimony, the PISD Board of Trustees re-adopted the same policy that it had adopted in April of 2005. The FNAA(LOCAL) policy adopted on November 1, 2005 (the "November 2005 Policy") is substantively the same as the April 2005 Policy, with one addition: the November 2005 Policy includes a Preamble to Policies FNAA(LOCAL) and GKD(LOCAL) (the "Preamble"). The Preamble memorializes the PISD Board of Trustees' reasons for adopting and enacting the November 2005 Policy. The parties filed cross motions for summary judgment on the facial constitutionality of the 2004 Policy and the April 2005 Policy. The November 2005 Policy was adopted after these cross motions were filed.

SUMMARY JUDGMENT STANDARD

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enters. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of

material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The moving party satisfies its burden by "pointing out to the district court ... that there is an absence of evidence to support the nonmoving party's case." *Id.*

Federal Rule of Civil Procedure 56 does not impose a duty on a district court to "sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citations omitted). Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Such nonmovant must also articulate the precise manner in which evidence he sets forth supports his claims. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994) (citation omitted). Moreover, in designating specific facts, the nonmovant must " 'go beyond the pleadings' " and use " 'his own affidavits, ... deposition[s], answers to interrogatories, and admissions on file.' " *Jones v. Sheehan & Young Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996) (citation omitted).[4]

If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden

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[4] The court also notes that Local Rule CV-56(b) states that a party's response to a summary judgment motion should "be supported by appropriate citations to proper summary judgment evidence...." Local Rule CV-56(c) further states that the court will not "scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial before entering summary judgment."

of proof, then summary judgment is appropriate. *Celotex*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (citations omitted).

DISCUSSION

The Supreme Court has cautioned that all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment," and that the federal judiciary should not "intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 105, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

At issue here is the very narrow question of whether the 2004 and 2005 policies are facially constitutional. Both parties cite the court to different precedents to support their positions. The law in this area is not crystal clear, and trial courts as well as appellate courts are frequently called upon to address complex as well as pedantic issues.

I. The 2004 Policy

Plaintiffs argue that the 2004 Policy is unconstitutional under *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). PISD argues that the 2004 Policy is constitutional, that *Tinker* is not the correct standard and that after the adoption of the 2005 Policies, the issue of whether the 2004 Policy is facially constitutional became moot. The court will first address whether the facial constitutionality of the 2004 Policy is moot.

In *Clark, et al. v. Dallas ISD, et al.*, 806 F.Supp. 116 (N.D.Tex.1992), the Plaintiffs challenged the facial constitutionality of the Dallas Independent School District ("DISD") 1984-85 Policy. Plaintiffs did not dispute that DISD had changed its 1984-85 Policy. The court found that "[b]ecause there is no reason for the court to believe that Defendants will revert to the 1984-85 policy, the court will not consider the facial validity of the 1984-85 policy." While the court found the *Clark* plaintiffs' claims for declaratory and injunctive relief were moot, it found the damage claims were not moot. And the court was left to decide what damages, if any, the Plaintiffs were entitled to receive as a result of the application of the 1984-85 policy.

In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), the Supreme Court stated that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." The Court found that it was a question of the exercise rather than the existence of jurisdiction. If evidence exists

that shows a defendant will reenact the old statute, then the question is not moot, and the court can resolve the facial challenge. In *Aladdin's Castle*, the defendant, through its prior conduct, displayed a likelihood that it would return to its prior practice; therefore, the Court found that it had jurisdiction over the appeal and that the trial court should determine whether the likelihood of the defendant reverting back to its old statute was sufficiently remote to make injunctive relief unnecessary. *Id.* at 289.

In *Bauer v. The Presiding Judge of Probate Court Number 3 of Harris County*, 341 F.3d 352, 358 (5th Cir. 2003), the court stated that " '[p]ast exposure to illegal conduct does not in itself show a present case or controversy requiring injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). In order to obtain equitable relief for past wrongs, a plaintiff must demonstrate a continuing harm or a real or immediate threat of defendant repeating the injury in the future. Somewhat troubling is the Defendants' Answer, which states that schools have an obligation to protect the children and educational environment by having a facially "neutral" policy that " 'discourages' non-curricular messages aimed at proselytizing...." "Factual assertions in pleadings are judicial admissions conclusively binding on the party that made them." *White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983). *See also Morales v. Dep't of the Army*, 947 F.2d 766, 769 (5th Cir. 1991); *Davis v. A.G. Edwards & Son*, Inc., 823 F.2d 105, 108 (5th Cir. 1987). This judicial

admission contradicts the District's assertion that the policy is neutral.

Plaintiffs argue that Defendant will revert back to the old policy and that prospective relief is necessary to prevent PISD from returning to its old unlawful ways. Plaintiffs claim that in its Answer, PISD has suggested it will continue to engage in religious viewpoint discrimination and that PISD refused to adopt a new policy prior to the filing of this lawsuit. Plaintiffs also submit that because the Texas Association of School Boards has a version of the 2004 Policy on its website, a mootness finding is inappropriate.

The ultimate question is whether there is a reasonable expectation that the wrong will be repeated. *Id.* PISD must demonstrate that there is no such reasonable expectation. PISD adopted a new policy in April of 2005 that grants more First Amendment privileges to students, relaxes time, place, and manner restrictions, and eliminates its prior restraints. PISD re-adopted this same policy after hearing testimony from educators within the district. Further, PISD specifically represented to this court that it would not revert back to the 2004 Policy. Since any attempt to revert back will most likely end up in this court, the court will take the District at its word. While that representation alone may not be enough to render moot Plaintiffs' facial challenge to the 2004 Policy, that representation combined with the adoption of the April 2005 and November 2005 Policies clearly demonstrates that there is no reasonable expectation that Defendant will reenact the 2004 Policy. *United States v. WT Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed.

1303 (1953). Further, this case does not concern what the TASB website contains. The conduct and representations of PISD and its lawyers establish that there is no reasonable expectation that PISD will revert back to the 2004 Policy.[5] As a result, the facial constitutionality of the 2004 Policy is moot. Judge Brown has already ruled on this issue and the court declines to revisit the issue. This is not to say that the 2004 Policy as applied to the Plaintiffs was constitutional and that the requirement of review was not arbitrary and whimsical as applied to the Plaintiffs, particularly in light of the Defendant's judicial admission that the policy was enacted to discourage proselytizing.

II. The April 2005 Policy and the November 2005 Policy

The April 2005 and November 2005 Policies (collectively "2005 Policies") are substantively the same, with one exception: the November 2005 Policy contains a Preamble.[6] However, the November

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[5] Under Federal Rule of Civil Procedure 11(b)(1), the attorney who signs a pleading, motion or other paper is "**certifying** that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-... it is not being presented for any improper purpose...."

[6] ***Preamble to Policies FNAA(LOCAL) and GKD(LOCAL)***

WHEREAS, the Board of Trustees finds it is the mission of the District to teach and train its students state and federally mandated curriculum and learning requirements, social skills and values, order, discipline, and respect for authority and each other; and

WHEREAS, the Board of Trustees finds that without first establishing discipline and maintaining order at the schools, teachers cannot begin to educate their students; and

WHEREAS, the Board of Trustees finds the District has a limited amount of time available to teach its students the above; and

WHEREAS the Board of Trustees finds that students should have an opportunity to distribute non-school materials in a manner that does not disrupt the educational process, the order and discipline of the schools and/or the operation of the schools; and

WHEREAS, the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to regulate the time, place and manner of non-school materials during times and places when the District is attempting to operate the schools and teach its students the above which the Board of Trustees finds to be reasonable and content neutral; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) relating to elementary schools are also intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering; and

WHEREAS, the Board of Trustees finds that, from an educational perspective, the distribution of non-school materials during times and places when the District is attempting to teach students is both distracting and a material and substantial disruption to the educational process and environment and to the order and discipline of the schools; and

WHEREAS, the Board of Trustees finds the provisions of the Policies FNAA(LOCAL) and GKD(LOCAL) leave open

2005 Policy is a re-adoption of the April 2005 Policy, which PISD made after hearing the testimony of eleven educators. For purposes of analyzing the facial constitutionality of the 2005 Policies themselves, they are considered together here.

Plaintiffs argue that the *Tinker* standard-material and substantial interference with schoolwork or discipline-is the correct standard to be applied to the distribution policies in this case. *Tinker v. Des Moines Independent Community School District, et al.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). In *Tinker,* school officials suspended students from public high school because they wore black armbands to school to protest the Vietnam War. The Court stated that "First Amendment rights, applied in light of the special circumstances of the school environment, are

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alternative forms of communication of non-school materials, such as alternative times and places to distribute such materials, non-disruptive oral speech, and "distribution tables"; and

WHEREAS, the Board of Trustees acknowledges receipt of testimony from educators, professionals and others and various written materials, including, but not limited to, studies, research, evaluations, and other findings that overwhelming [sic] support the adoption of Policies FNAA(LOCAL) and GKD(LOCAL); and

WHEREAS, the Board of Trustees believes that, to better improve the educational process, environment, safety and order at District schools, it is necessary to adopt the reasonable time, place and manner regulations in Policies FNAA(LOCAL) and GKD(LOCAL);

The Board of Trustees hereby approves and adopts the above findings to support the passage of and hereby adopts Policies FNAA(LOCAL) and GKD(LOCAL).

available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech of expression at the schoolhouse gate." *Id.* at 506. *Tinker* was a viewpoint discrimination case. Students were suspended based on the political viewpoint of their speech. The Court found it relevant that the school authorities did not purport to prohibit the wearing of all political or controversial symbols. Students in some of the schools wore buttons relating to national political campaigns, and some wore Iron Crosses. The order prohibiting armbands did not extend to these, so the Court found that "[c]learly, the prohibition on expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.*

Defendants argue that the correct standard to be applied to the 2005 Policies is the standard applicable to time, place, and manner restrictions or the *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *see also Canady v. Bossier Parish School Board*, 240 F.3d 437, 443 (5th Cir. 2001) (stating that for the purposes of a constitutional challenge to the policy, the *O'Brien* test and the test applicable to time, place and manner restrictions are virtually the same). PISD relies on *Canady* for the proposition that the Fifth Circuit has rejected the blanket application of the *Tinker* analysis in any and all student speech cases. In *Canady* the plaintiffs sued the school board for an injunction against the enforcement of a mandatory school uniform policy.

The Fifth Circuit found that the level of scrutiny applied to regulations of student expression depends on the substance of the message, the purpose of the regulation and the manner in which the message is conveyed. The Fifth Circuit specifically found *Tinker* was applicable to school regulations directed at student viewpoints, and *Tinker* does not account for regulations that are completely viewpoint-neutral. *Canady*, 240 F.3d at 443. The present case presents just such a situation where the regulations are viewpoint-neutral. The 2005 Policies are regulations on the time, place and manner of student distribution of non-school materials. Nothing on the *face* of the policies discriminates against a particular viewpoint, and the summary judgment evidence does not establish that PISD's intent in adopting these policies was to discriminate against a particular viewpoint. As a result, *Tinker* is not the standard to be applied in this case for determining the facial constitutionality of the 2005 Policies.

In fact, the 2005 Policies greatly expand the First Amendment rights of students in the Plano school district. Materials are no longer subject to a prior submission rule in either elementary or middle and secondary schools. Students are simply subject to time, place and manner restrictions. The ultimate question is whether those restrictions are reasonable. "When, where, and how children can distribute literature in a school is for educators, not judges, to decide provided such choices are not arbitrary or whimsical." *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996). Expression by high school students may be limited by reasonable and equally-applied time,

place and manner restrictions. *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972). In fact, the state may even enforce regulations of time, place and manner of expression in traditional public forums, such as a park or a public street, provided those regulations are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *Chiu, et al. v. Plano ISD, et al.*, 260 F.3d 330 (5th Cir. 2001) (Chiu I). Government regulation of speech is content neutral if it is "justified without reference to the content of the regulated speech." *Ward, et al. v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, S.Ct. 2746, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). And while the regulation must be narrowly tailored to serve a significant governmental interest, it is not required to be the least intrusive means of achieving the desired end. This "less-restrictive-alternative analysis ... has never been part of the inquiry into the validity of a time, place, and manner regulation." *Id.* Time, place, and manner restrictions are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* The "narrowly tailored" requirement is satisfied if the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation; however, the government cannot regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. While content-neutral time, place and manner restrictions must be narrowly tailored, strict scrutiny is not applicable to time, place and manner restrictions.

Id. Finally, the regulation must leave open alternative channels of communication.

With regard to the time, place and manner regulations the 2005 Policies set out for elementary schools, the regulations are content-neutral. The stated purposes of the regulations in the 2005 Policies are providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state mandated learning requirements. As set out above, the 2005 Policies also restrict distribution of non-school materials in the elementary school hallways. Plano ISD's stated purposes for this regulation are facilitating the safe, organized, and structured movement of students between classes and allowing access to assigned lockers for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming. The 2005 Policies also prohibit distribution of non-school materials in elementary cafeterias during designated meal times. This regulation promotes the stated purpose of Plano ISD's elementary cafeterias during designated mealtimes of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline. These policies also help to reduce financial costs and ensure safety and security caused by litter and trash. These regulations are justified without relation to the content of the non-school materials.

These regulations are narrowly tailored to achieve a significant governmental interest. Improving the educational process is an important and substantial interest of a public school system. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001). The regulations only restrict the time and the place for distribution of non-school materials to the extent necessary to further its interests. The purpose of any public school is the education of its students. Certainly in an elementary setting, more structure is required to ensure that the limited time allotted for instruction is maximized, while still being careful to protect the First Amendment rights of students. Here, Plano ISD has narrowly tailored its time and place regulations to further its interest of providing education and instruction to elementary students.

Finally, the 2005 Policies leave open ample alternative channels of communication. Elementary students may distribute non-school literature 30 minutes before school, 30 minutes after school, during designated recess periods, on a designated distribution table and during the three holiday parties. The alleged prohibition of distributing non-school material at Plano ISD holiday parties has been a focal point of this litigation and was the primary reason for Plaintiffs' application for a temporary restraining order in December of 2004. This provision eliminates any confusion as to whether elementary students may exchange non-school materials at these parties. These provisions leave ample opportunity for elementary students to distribute non-school materials. Because the time and place regulations placed on the distribution of non-school materials by Plano ISD elementary

students during school hours are content neutral, narrowly tailored to promote a significant governmental interest, and leave open alternative avenues of communication, the 2005 Policies are facially constitutional.

The 2005 Policies also put time and place regulations on middle and secondary school students. Middle and secondary school students (sixth through twelfth grades) may distribute non-school materials 30 minutes before and 30 minutes after school hours at any school entrance or exit and at any "gathering areas" approved by the principal, in the school hallways during non-instructional time during school hours, in school cafeterias during designated lunch periods and non-instructional time, and students may leave materials on a "distribution table." Essentially, middle and secondary school students are prohibited from distributing non-school materials in the classrooms during school hours. Again, the PISD's stated interests are providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state mandated learning requirements. These interests are significant and are content-neutral. With respect to middle and secondary school students, the time and place regulations are narrowly drawn to serve Plano ISD's interest in providing education and instruction to its students. Middle and secondary school students are only prohibited from distributing non-school materials in the classroom. Math class is for learning math and a regulation that does not permit students to exchange materials that do not relate to math class in the classroom is narrowly tailored to that end. Plano ISD has

recognized that middle and secondary school students do not need as structured an environment as do elementary school students, and these regulations reflect that recognition. Further, ample alternative channels of communication exist. These students may distribute non-school materials at entrances before school and after school, in the halls during non-instructional times, and during lunch and in the cafeteria during non-instructional times. In fact, Michael Novotny, principal of Jasper High School, testified at the November 1, 2005 public board meeting that the 2005 Policies provided over two hours during which students could distribute non-school materials during the school day over a great deal of the campus. Accordingly, the time, place and manner regulations as to middle and secondary school students are reasonable and facially constitutional.

III. Objective Evidence

As previously discussed, the November 2005 Policy and the April 2005 Policy are substantively the same, with one addition, a preamble, which memorializes the board's legislative intent. The Plano ISD school board held a public meeting on November 1, 2005, at which it received additional objective evidence to support its policy. After hearing this evidence, the Plano ISD school board re-adopted the April 2005 Policy and added a preamble.

Plaintiffs argue repeatedly that Plano ISD has failed to offer objective evidence to establish that the speech in question can be constitutionally regulated. Plaintiffs repeatedly state that this is PISD's burden under *Tinker*. However, *Tinker* is not

the applicable standard because the 2005 Policies are content-neutral and only regulate the time, place and manner of the distribution. The Fifth Circuit in *Shanley* only required that the school board demonstrate reasonableness in its regulations. *Shanley*, 462 F.2d at 971 (5th Cir. 1972). The court in *Shanley* went on to state that the school administration need not stay a reasonable exercise of restraint until a disruption actually occurs. *Id.* And here PISD does not even impose a restraint on speech; it merely imposes reasonable regulations.

Even though the April and November 2005 Policies are facially reasonable regulations of time, place and manner, PISD has provided summary judgment evidence in the form of the Affidavit of Danny Modisette and the supplemental summary judgment evidence, which includes a transcript of the testimony of professional educators.

In his affidavit, Deputy Superintendent Modisette states that he has been an educator in public schools for thirty-five years and has served in his current position for PISD for the past five years. Based on his experience, Modisette states that he has personal knowledge of the disruption to one or more students caused by the distribution of non-school materials, such as birthday cards, concert tickets and inanimate objects. Modisette states that these disruptions ultimately cause a material disruption of the learning environment. Modisette met with elementary principals throughout PISD to discuss their observations concerning whether the distribution of non-school materials during instructional time caused a material disruption.

Based on their experience and observations, the principals expressed to Modisette that such distribution creates a material disruption. Modisette stated that he advised the PISD Board of Trustees of this information prior to the adoption of the April 2005 Policy.

The transcript of the public PISD school board meeting held on November 1, 2005 contains additional evidence supporting the reasonableness of the time, place and manner regulations. Eleven educators testified based on their observations and experience. Elizabeth Kirby, principal of Beverly Elementary, testified that the distribution of non-school items can particularly cause disruptions in the elementary school setting when the distributions, such as an invitation, are not made to every student. Students spend time discussing who did not receive an invitation and then spend time consoling students who did not receive an invitation. This process takes attention off instructional time and shifts students' focus from the lesson to the distribution. Ms. Kirby further testified that distribution in the elementary hallways can often result in tardiness, which distracts from instructional time. Pam Murray, principal of Mitchell Elementary testified that in moving hundreds of students, ages five through eleven, through the halls during the school day requires orderliness procedures. In the hallways, elementary students are learning how to follow the directions of teachers, respect for other students in classrooms adjacent to the hallway and efficient use of time. Distribution of non-school items during this time is not favorable in achieving these goals. Principal Murray also stated that during the lunch

period in elementary cafeterias, teachers and cafeteria staff spend time teaching students to make nutritious choices, to be polite to cafeteria workers, to be responsible and enter their own PIN numbers and to walk safely in between tables without bumping into someone. She further testified that there are approximately 100 to 120 students in each grade level. These students have 30 minutes to enter the cafeteria, wait in line, get their lunches and eat their lunches, and all of this can only be accomplished by having routines set out each day. As previously stated Michael Novotny, principal of Jasper High School, testified that the 2005 Policies allow students to distribute non-school materials for a total of over two hours during the school day. Bonnie Manley, principal of Murphy Middle School, testified that instructional time begins when the students enter the classroom, if not before and cited a specific example of instruction beginning during the four minute passing period.

Plaintiffs argue that this evidence is insufficient as supposition and unsubstantiated fears. However, the Fifth Circuit has often deferred to the school administration regarding school policies. *See Canady*, 240 F.3d at 441 (finding that educators have an essential role in regulating school affairs and in establishing appropriate standards of conduct); *Shanley*, 462 F.2d at 967 (stating "[t]hat courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions."); *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) (recognizing that the establishment of an educational program requires rules and regulations necessary for the

orderly classroom learning and that officials have a wide latitude of discretion in implementing such rules and regulations). The testimony of the educators themselves on the effects of distribution of non-school materials in the public school is competent summary judgment evidence to support the reasonable regulations provided in the policies.

IV. Vagueness

Plaintiffs also argue that PISD's distribution policies are void for vagueness. Invalidation of a law for vagueness is appropriate if the terms of the statute are so indefinite that "men of common intelligence must necessarily guess at its meeting and differ as to its application." *Reeves v. McConn*, 621 F.2d 377, 383 (5th Cir. 1980). PISD's 2005 policies are not vague. Men of common intelligence would understand what type of speech is regulated, that is non-school materials at the specific times and places set out in the policies. Plaintiffs have failed to raise any specific argument as to how men of common intelligence would only be able to guess at the meaning of the 2005 Policies; therefore, the 2005 Policies are not invalid based on vagueness.

V. Overbroad

Finally, Plaintiffs argue that PISD's distribution policies are unconstitutionally overbroad. "If, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement." However, the United States Supreme Court has "cautioned that invalidation of state laws for facial overbreadth is a remedy that should be applied 'sparingly and only as a last

resort.' " *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973)). The extent to which the statute is overbroad must be both real and substantial. *Id.* Plaintiffs complain that the policy restricts speech that does not cause a material or substantial disruption; however, this is not the standard applied to regulations on time, place and manner. Plaintiffs put forth examples such as a senior handing an admission packet to a friend during English class and a sixth grader handing a note to her friend at her locker. First, the 2005 Policies do not prohibit a sixth grader from handing a note to her friend at their lockers. Second, these examples hardly rise to the level of being substantially overbroad. English class is for education in English. A policy is not substantially overbroad if it restricts the English classroom to that purpose. Accordingly, the 2005 Policies are not overbroad.

RECOMMENDATION

Based upon the foregoing, it is the Court's recommendation that Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 27] should be DENIED and Defendant Plano Independent School District's Cross Motion for Summary Judgment [Doc. No. 53] should be GRANTED.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

Appendix F

UNITED STATES DISTRICT COURT, E.D. TEXAS, SHERMAN DIVISION

Jonathan MORGAN, et al.,
Plaintiffs,

v.

The PLANO INDEPENDENT SCHOOL DISTRICT, Lynn Swanson, individually and as principal of Thomas Elementary School, Lisa Long, individually and as principal of Wells Elementary School, Suzie Snyder, individually, Jaclyn T. Bomchill (a/k/a Jackie Bomchill), individually and as principal of Rasor Elementary School, John Beasley, individually, Carole Greisdorf, individually and as the Assistant Superintendent of the Plano Independent School District, and Doug Otto, individually and as the Superintendent of Plano Independent School District,
Defendants.

Feb. 20, 2007

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE GRANTING IN PART AND DENYING IN PART INDIVIDUAL DEFENDANT'S MOTION TO DISMISS BASED ON QUALIFIED IMMUNITY

DON D. BUSH, *United States Magistrate Judge*.

On this day came on for consideration the Individual Defendants' Motion to Dismiss Based on Qualified Immunity [Doc. No. 30]. Having considered the motion, Plaintiffs' Response [Doc. No. 41], the Individual Defendants' Reply [Doc. No. 52] and Plaintiffs' Surreply [Doc. No. 56], the Court is of the opinion the motion should be granted in part and denied in part.

BACKGROUND

On December 15, 2004, Plaintiffs filed Plaintiffs' Original Complaint requesting a temporary restraining order, preliminary and permanent injunctive relief, declaratory judgment, nominal damages, and attorney's fees and costs for constitutional violations. Plaintiffs filed their Amended Complaint on May 20, 2005 and their Second Amended Complaint on August 18, 2005. In their Second Amended Complaint, Plaintiffs brought claims against several PISD employees and officials in their individual capacities, including Lynn Swanson (principal of Thomas Elementary), Lisa Long (principal of Wells Elementary), Suzie Snyder (teacher at Thomas Elementary), John Beasley (PISD Security Police Services), Carole Greisdorf (Assistant Superintendent of PISD), and Doug Otto (Superintendent of PISD) (collectively the "Individual Defendants").[1] The Individual Defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) on the basis of qualified immunity.

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[1] Jaclyn, or "Jackie" Bomchill was also sued in her individual capacity; however this Individual Defendants' motion does not address the claims against her.

The relevant facts for the purposes of resolving this motion involve four separate incidents that allegedly occurred on various campuses at PISD.[2] In their Second Amended Complaint, Plaintiffs allege the following facts:

1. 2002-2003 W.H.L. Wells Elementary School

During the two years prior to the 2002-2003 academic year at Wells Elementary, Michael Shell and Kevin Shell were allowed to distribute invitations or tickets for events at their church to fellow students. Other students were also allowed to distribute secular non-school materials. During the 2002-2003 academic school year, Suzie Snyder was Kevin Shell's teacher and Lisa Long was the principal at Wells Elementary. In late March to early April of 2003, Kevin Shell took religious viewpoint invitations and tickets to distribute to his classmates, inviting them to attend the Prestonwood Baptist Church Easter Sunrise service. Ms. Snyder informed Kevin that he could not distribute the tickets while on school property because they were religious. Kevin asked Ms. Snyder when he could announce to his classmates that he had tickets to distribute and to actually distribute the tickets. After consulting with Principal Long, Ms. Snyder informed Kevin that the tickets were "inappropriate materials" for discussion and distribution by one student to another student

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[2] Plaintiffs Second Amended Complaint also includes an incident that occurred in 2001 involving Christina and Michaela Wade; however, the Wade Plaintiffs do not seek damages for the 2001 actions, only equitable relief.

while on school property. Snyder further informed Kevin that he could never discuss or distribute the religious viewpoint tickets to his school classmates during school.

On Monday, April 7, 2003, Michael and Kevin Shell took tickets for the Prestonwood Easter Sunrise Service to school and offered these free tickets to their classmates at Wells Elementary. Michael Shell's teacher, Ms. Krauss, told Michael Shell that he could verbally tell his classmates about the sunrise service and could offer them a ticket if they would like to take one. Kevin Shell made this same request of Ms. Snyder, and after conferring with Principal Long, Ms. Snyder informed Kevin Shell that he could not, at any time, discuss or distribute the free tickets to the sunrise service while he was on school property.

On Friday, May 2, 2003, Kevin and Michael Shell took free tickets for another Prestonwood Baptist Church program to school in order to offer the tickets to their classmates. Michael Shell was permitted to verbally announce the program, to discuss the program with this classmates and to offer tickets to those classmates showing an interest. Ms. Snyder did not allow Kevin Shell to verbally announce that he had tickets or to offer the tickets for the program to his classmates. In response to Ms. Snyder's decision, Sunny Shell, Kevin and Michael Shell's mother, called both Ms. Snyder and Principal Long. Principal Long returned Sunny Shell's call, and when asked by Sunny Shell why Kevin Shell was not allowed to announce and distribute the tickets, Principal Long responded

that perhaps Ms. Snyder misunderstood the PISD policy.

On Monday, May 5, 2003, Carole Greisdorf, PISD Assistant Superintendent, returned a call that Sunny Shell had made to the PISD Board of Trustees president Mary Beth King. Sunny Shell requested that Ms. Greisdorf provide the correct interpretation and application of the PISD policy with regard to announcing and distributing materials from one student to another. Ms. Greisdorf stated that Michael Shell's teacher violated PISD policy by allowing Michael Shell to announce in class and distribute tickets and that Principal Long and Ms. Snyder had acted in accordance with PISD policy. Ms. Greisdorf stated that under PISD policy, the Shells could not announce or offer any religious material or religious information to any other student at any time while on school property. Ms. Greisdorf further stated that the Shells could not distribute tickets during lunch and recess because lunch was a part of the social studies curriculum and recess was part of the physical education curriculum. Ms. Greisdorf explained to Sunny Shell that the policies allowing students to form religious led activities, pass out literature and make announcements only applied to secondary schools. Ms. Greisdorf sent Sunny Shell an email referring her to a PISD policy on time, place and manner of distribution and to the staff handbook, which does not allow students to hand out invitations to private parties. Michael Shell and Kevin Shell never offered more than ten tickets to any classmates.

2. 2003 Thomas Elementary School Winter Break Party

The Thomas Elementary School Winter Break Party was scheduled for December 19, 2003. Students were allowed to distribute a small gift to their classmates at the party, and Jonathan Morgan wanted to give a candy cane ink pen with a laminated bookmark attached containing a religious message entitled "The Legend of the Candy Cane."[3] Jonathan Morgan wanted to include this gift in a sealed goodie bag for each of his classmates with the inscription "To: [classmate's name] From: Jonathan Morgan."

In previous years, students were not allowed to give gifts with a religious viewpoint or a religious message. On November 28, 2003, Doug and Robin Morgan, Jonathan Morgan's parents, contacted PISD seeking clarification of the school's policy as it related to the distribution, by one student to

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[3] The laminated bookmark read: The Legend of the Candy Cane. A candy maker wanted to invent a candy that was a witness to Christ. First of All, he used a hard candy cane because Christ is the Rock of Ages. This hard candy was shaped so that it would resemble a "J" for Jesus, or turned upside down, a shepherd's staff. He made it white to represent the purity of Jesus. Finally, a red stripe was added to represent the blood Christ shed for the sins of the world, and three thinner red stripes he received on our behalf when the Roman soldiers whipped him. Sometimes a green stripe is added as a reminder that Jesus is a gift from God. The flavor of the cane is peppermint, which is similar to hyssop. Hyssop is in the mint family and was used in the Old Testament for purification and sacrifice. Jesus is the pure Lamb of God, come to be a sacrifice for the sins of the world. So, every time you see a candy cane, remember the message of the candy maker: Jesus is the Christ!!

another student while on PISD property, of non-school material containing religious viewpoints, symbols and messages. PISD personnel directed Doug Morgan to Ms. Greisdorf. Ms. Greisdorf suggested that Doug Morgan set up a meeting with Principal Swanson to discuss the student-to-student distribution of religious materials.

On December 4, 2003, Doug and Robin Morgan and Robin Morgan's parents met with Principal Swanson. Principal Swanson confirmed that in the past, school officials had questioned parents and students regarding whether their goodie bags contained any religious viewpoint or religious reference material and had confiscated any such material. Principal Swanson further stated that PISD personnel would continue this practice in the future. Principal Swanson also confirmed that the term "Winter Break" would be used to describe the party instead of "Christmas," and that "Christmas" was a religious viewpoint term that should not be used to describe events at PISD schools. Principal Swanson stated that she would investigate whether teachers instructed PISD students to write "Happy Holidays" instead of "Merry Christmas" on greeting cards and whether the colors red and green were restricted from the Winter Break parties, but she did confirm that all symbols which represented Christmas or the Christian religion would be banned. Principal Swanson further told Doug Morgan that the distribution of secular gifts would be permitted including Jonathan Morgan's candy cane ink pen; however, the bookmark bearing "The Legend of The Candy Cane" would not be permitted because of the religious message it contained.

Principal Swanson later informed Doug Morgan that she confirmed with PISD administration that her explanation was correct. And on December 17, 2003, Doug Morgan sent Ms. Greisdorf an email about his conversation with Principal Swanson and Jonathan Morgan's desire to hand out his "The Legend of the Candy Cane" gift. Doug Morgan asked Ms. Greisdorf if giving this gift was a violation of PISD policy. Ms. Greisdorf responded that Principal Swanson's interpretation was exactly right and that the PISD policies prohibited Jonathan Morgan from distributing his religious gifts. Ms. Greisdorf also stated that no student could distribute a religious viewpoint gift while on school property and that Jonathan Morgan could only disseminate his information by placing it on the information table or by distributing it off school property.

On December 19, 2003, Doug and Jonathan Morgan went to the Thomas Elementary School office to attempt to meet with Principal Swanson prior to Jonathan Morgan taking his goodie bags to class, but Principal Swanson was not able to meet with them. Doug and Jonathan Morgan took Jonathan's tray of goodie bags, which contained "The Legend of the Candy Cane" bookmarks, to the classroom and placed the tray outside of the classroom. Jonathan Morgan's teacher Ms. Helmke told Doug and Jonathan Morgan that Jonathan could only place his goodie bags in the school library and could not bring them into the classroom because the bags contained religious material. Other students were allowed to bring their goodie bags into the classroom. Principal Swanson arrived at Ms. Helmke's classroom and said that Jonathan Morgan could only place his goodie bags in the

school library, but Principal Swanson did not require other students to take their goodie bags to the school library. Doug Morgan informed Swanson that Ms. Helmke told him that Jonathan Morgan's materials were not permitted in the classroom because of the religious viewpoint they contained, and Principal Swanson stated that Ms. Helmke had acted in accordance with PISD policy. Principal Swanson then made an announcement that students could not take materials into the classroom.

On December 19, 2003, Doug and Robin Morgan again went to meet with Principal Swanson before the party. Principal Swanson again confirmed that Jonathan Morgan could not hand out his gifts that contained a religious message at the party. Doug Morgan asked if he could distribute the gifts to other parents, but Swanson stated that Doug Morgan could not distribute the laminated "The Legend of the Candy Cane" cards to adults.[4] Principal Swanson then went to Jonathan Morgan's classroom and informed Doug Morgan that the distribution rules for religious materials applicable to students were also applicable to parents and that he would only be permitted to distribute the laminated cards in the library or off campus. During the 2003 Winter Break party, other students were allowed to give gifts, and Mrs. Helmke distributed pencils bearing a picture of a snowman to the students.

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[4] Parents were invited to attend the 2003 Winter Break party at Thomas Elementary School.

3. 2003-2004 Hughston Elementary

On January 20, 2004, Sunny Shell sent an email to Ms. Greisdorf concerning the distribution at school of tickets to the Harvest Rally, a religious event being sponsored by Prestonwood Baptist Church. Ms. Greisdorf referred Sunny Shell to Policy FNAA (LOCAL) and directed Shell to contact her school principal. On January 22, 2004, Sunny Shell met with Hughston Elementary Principal Collins and asked if Kevin and Michael Shell could disseminate, share or offer the Harvest Rally tickets during non-instructional time and in a non-disruptive manner. Principal Collins stated that according to PISD policy, Kevin and Michael Shell would never be permitted to distribute religious materials while on school property and could not make an announcement about the tickets in class or during recess. On January 26, 2004, Sunny Shell emailed PISD Superintendent Dr. Doug Otto concerning the distribution of tickets to religious viewpoint events to students while on school property. Ultimately, Michael and Kevin Shell were not permitted to distribute tickets to the Harvest Rally while at school, but other students were permitted to exchange non-school materials on school property. Sunny Shell did not receive any response from Ms. Greisdorf or Dr. Otto indicating that Kevin and Michael Shell would be permitted to distribute the Harvest Rally tickets

4. 2004 Rasor Elementary School

In 2004, Stephanie Versher, a student at Rasor Elementary, spoke to classmates with whom she was in close association, about a drama depicting the crucifixion of Jesus Christ at her church. If the

students expressed an interest in attending, Stephanie Versher would give the student a free ticket. The principal of Rasor Elementary, Jackie Bomchill, instructed Stephanie Versher's teacher to stop Stephanie from distributing the tickets and to require the students who had already received a ticket to return it. Stephanie Versher's teacher instructed her to stop distributing the free tickets to her classmates while school property. The tickets that Stephanie Versher had already given to her classmates were collected by the teacher and discarded.

At Rasor Elementary, if a student's birthday falls in the summer months, the student may celebrate her "half birthday" during the school year with her classmates at school. Stephanie Versher wanted to celebrate her half birthday at school with her classmates on January 16, 2004. Other students had celebrated their birthdays and half birthdays prior to January 16, 2004, and on those occasions, the students would distribute a snack and a small gift to their friends and classmates. Stephanie Versher and her sister Susan had received various gifts at the parties of other students, including a Chinese Bookmark with a printed message on it, a Lion King ring containing words and symbols, a pencil with an eraser and picture of penguins, a pencil bearing various symbols, and a pencil with the words "Where's Hippo?" printed on it. Bomchill had never prohibited these gifts prior to January 16, 2004.

The half birthday parties are celebrated during non-curriculum time at school-usually at the end of the lunch period or during a snack break between

instructional periods. Stephanie Versher wanted to bring brownies and pencils bearing the words "Jesus loves me this I know for the Bible tells me so" to distribute to her friends and classmates. Sherrie Versher, Stephanie Versher's mother, obtained two types of pencils for Stephanie to hand out at her half birthday party. One was the "Jesus love me" pencil, and the other was a pencil with the word "Moon" printed on it. Pursuant to a school rule concerning distribution of candy and food at school, Sherrie Versher went to school to meet with Principal Bomchill on January 15, 2004 in order to obtain permission to distribute brownies the following day, but Principal Bomchill was unable to meet with Sherrie Versher that day. On January 16, 2004, Sherrie Versher took her brownies and the two pencils that Stephanie wanted to give to her classmates-one religious, one secular-to the school office and requested to see Principal Bomchill.

Upon arriving at Principal Bomchill's office, John Beasley, with PISD Security Police Services, handed Sherrie Versher a letter in which Beasley accused Sherrie Versher of a violation of PISD policies by distributing materials to students on school property at Rasor Elementary and informed Sherrie Versher that law enforcement officials would be called to the school to arrest Sherrie Versher. The letter specifically cited PISD policy "GKD Local Community Relations: Use of School Facilities for Non-School Purposes; Subsection titled Distribution of Non-School Literature." Sherrie Versher believed Beasley's letter to be a threat in response to the lawful exercise of her Constitutional rights. Sherrie Versher was then escorted into Principal Bomchill's office.

Principal Bomchill informed Sherrie Versher that if her daughter did not cease distributing religious materials while on school property, the police would be called; Principal Bomchill stated that Stephanie Versher could only distribute religious tickets and religious pencils outside the school building. Sherrie Versher showed Principal Bomchill the brownies and pencils that Stephanie planned to distribute that day. Principal Bomchill informed Sherrie Versher that Stephanie could hand out the brownies and the "Moon" pencils, but that she could not hand out the "Jesus loves me" pencils. Sherrie Versher then asked if she could speak with an attorney regarding the legal restrictions PISD could place on the religious pencils. Sherrie Versher ultimately removed the religious pencils from the gift and placed them in her purse.

Sherrie Versher left the office with her tray of brownies and the "Moon" pencils, and as she exited the office she "thought out loud to herself 'Satan is in the building.' " Sherrie Versher then carried the brownies and the "Moon" pencils to the party. Beasley followed her and stood against the wall near the party. After the party concluded, Sherrie Versher walked Stephanie to her locker and handed the "Jesus loves me" pencils to Stephanie and told her to put them in her backpack and not take them out during school. Sherrie Versher then told her daughter that she could distribute the pencils after school on the school lawn. Sherrie Versher then proceeded to the second-grade wing of the building where her younger daughter was a student. Beasley followed her down the second-grade wing and when Sherrie Versher inquired why he was following her,

Beasley stated that he was escorting her out of the building and advised her that the police were on their way. Beasley stated that Sherrie Versher had made a threat and created a disturbance. As Sherrie Versher exited the Rasor Elementary campus, she was pulled over by two Plano police officers. One of the officers inquired about the threat, and ultimately, Sherrie Versher was allowed to leave.

After school, Stephanie Versher attempted to distribute her "Jesus loves me" pencils to her friends on the school lawn. Principal Bomchill took away a pencil that Stephanie had handed to one of her friends and told Stephanie that she was in violation of PISD policy; Stephanie was not allowed to distribute religious viewpoint pencils while on school property. Principal Bomchill and Beasley then approached Sherrie Versher and stated that if Stephanie tried to distribute her religious pencils while on school property again, she would be kicked out of school.

DISCUSSION

The Individual Defendants moved to dismiss the claims against them, and in the alternative, moved for summary judgment on the claims against them. A stay on discovery in this case is currently in place and a motion for summary judgment is therefore premature. Accordingly, the court will treat the Individual Defendants motion as a motion to dismiss on the basis of qualified immunity pursuant to Federal Rule of Civil Procedure 12(b)(6).

Rule 12(b) (6) Motion to Dismiss Standard

A motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) "is viewed with disfavor

and is rarely granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). For a complaint to be dismissed for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Reeves v. City of Jackson, Mississippi*, 532 F.2d 491 (5th Cir. 1976). The Court must accept as true all well-pleaded facts contained in plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In addition, all reasonable inferences are to be drawn in favor of the plaintiff's claims. *Lowrey*, 117 F.3d at 247. The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is examined in the light most favorable to the plaintiff and with every doubt resolved in the plaintiff's favor. *Lowrey*, 117 F.3d at 247. However, to survive a Rule 12(b)(6) motion, the plaintiff must plead specific facts, not mere conclusory allegations. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

Qualified Immunity

The Individual Defendants raise the defense of qualified immunity to the claims against them. Qualified immunity shields government officials performing discretionary functions from individual liability for civil damages "insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Thompson v. Upshur County*,

245 F.3d 447, 456 (5th Cir. 2001). Qualified immunity serves to ensure that before a government official can be subjected to suit in her individual capacity, she is on notice that her conduct is unlawful. *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 2158, 150 L.Ed.2d 272 (2001). Whether a government official is shielded from suit by qualified immunity is determined by a two-step analysis. *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004); see also *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (noting that when a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense). First, the court must determine whether the plaintiffs' allegations, if true, establish a constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 2513, 153 L.Ed.2d 666 (2002). And when qualified immunity is asserted, Plaintiffs are required to specifically plead the facts establishing the right to recover. *Shultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995). Second, the court must determine whether a particular defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope*, 536 U.S. at 739.

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (internal citation omitted).

First Amendment

Plaintiffs generally argue that the Individual Defendants imposed unlawful prior restraints on Plaintiffs, and more specifically, Plaintiffs argue that each named individual defendant is not entitled to qualified immunity because he or she engaged in viewpoint discrimination.

Prior Restraints

It has been long recognized that "ordinances regulating speech contingent on the will of an official-such as the requirement of a license or permit that may be withheld or granted in the discretion of an official-are unconstitutional burdens on speech classified as prior restraints." *Chiu, et al. v. Plano Independent School District*, et al., 339 F.3d 273, 280 (5th Cir. 2003). And a "prohibition on the distribution of literature is a classic form of prior restraint." *Id.* There is nothing per se unconstitutional about a requirement that students submit materials to school officials before distributing those materials. *Shanley v. Northeast Independent School District*, 462 F.2d 960, 969 (5th Cir. 1972). However, a rule " 'subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.' " *Chiu*, 339 F.3d at 280. (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1075)). "A party enforcing a prior restraint 'carries a heavy

burden of showing justification for the imposition of such a restraint.' " *Id.* (quoting *Org. For a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971)). The Fifth Circuit in Chiu held that prior restraints were unconstitutional, even in schools, except where they "are designed to maintain discipline or to prevent school disruption and are narrowly drawn to achieve that end." *Id.*

Viewpoint Discrimination

Plaintiffs also allege viewpoint discrimination. "'The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.' " *Chiu v. Plano Independent School District*, 260 F.3d 330, 350-51 (5th Cir. 2001) (quoting *Rosenberger v. Rector & Visitors Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). "Viewpoint discrimination violates the First Amendment regardless of the forum's classification." *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992). When school regulations are directed at specific student viewpoints, those viewpoints are governed by the standard of scrutiny set out in *Tinker v. Des Moines Independent Community School District. Canady v. Bossier Parish School Board*, 240 F.3d 437, 442 (5th Cir. 2001). In *Tinker*, the United State Supreme Court held that First Amendment rights were available to students and teachers while at school and stated that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736

21 L.Ed.2d 731 (1969). *Tinker* was a viewpoint discrimination case in which school officials suspended students from public high school because they wore black armbands to school to protest the Vietnam War. Students were suspended based on the political viewpoint of their speech. The Court found it relevant that the school authorities did not purport to prohibit the wearing of all political or controversial symbols. Students in some of the district's schools wore buttons relating to national political campaigns, and some wore Iron Crosses. The order prohibiting armbands did not extend to these, so the Court found that "[c]learly, the prohibition on expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 89 S.Ct. at 738-39. Thus, when a school regulation is directed at restricting a student's expression of a particular viewpoint, the school must demonstrate that the expression would " 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' " *Id.* at 738. Otherwise, that regulation is unconstitutional.

Plaintiffs have alleged claims against seven different PISD employees and officials in their individual capacities based on at least four different occurrences at various PISD campuses. Therefore, the Court will address each individual defendant in turn.

1. Lisa Long, Principal of Wells Elementary School

First, the Court must determine whether Plaintiffs allegations, if true, establish a constitutional violation on the part of Principal Long. Plaintiffs have alleged in their Second Amended Complaint that Principal Long abridged the First Amendment rights of Kevin Shell by directing Ms. Snyder to prohibit Kevin from announcing, discussing or distributing his religious viewpoint tickets while on school property. Specifically, Kevin Shell alleges that under the direction of Principal Long, Snyder informed Kevin Shell that the tickets he wished to distribute to his classmates, inviting them to the Prestonwood Baptist Church sunrise service, were inappropriate materials for student-to-student distribution or discussion while on school property because of the religious viewpoint of the materials. Despite Ms. Snyder's instructions, Kevin brought the tickets to school for distribution, and Plaintiffs allege that on the direction of Principal Long, Snyder instructed Kevin that he could not, at any time while on school property, discuss or distribute tickets to the sunrise service. On one more occasion in the spring of 2003, Kevin Shell brought tickets for a program at Prestonwood Baptist Church to distribute to his classmates at school. Ms. Snyder did not allow Kevin to announce that he had tickets for distribution or to offer tickets to his classmates. When Sunny Shell, Kevin's mother, contacted Principal Long and inquired why Kevin was not able to announce and distribute the tickets, Principal Long allegedly responded that perhaps Ms. Snyder misunderstood PISD policy.

With respect to Principal Long, Plaintiffs do not specifically argue that Long imposed a prior restraint on Kevin Shell's distribution of tickets to a religious event. Kevin was not asked to submit materials for review by a school official prior to distribution. Instead, Plaintiffs allege that Principal Long engaged in viewpoint discrimination by forbidding the announcement, distribution or even the discussion of the tickets to religious events at Prestonwood Baptist Church by Kevin Shell to his classmates while on school property. Accepting the facts pled in the Second Amended Complaint as true, Plaintiffs have alleged facts that would establish viewpoint discrimination on the part of Principal Long. Under Tinker, this type of prohibition on expression is unconstitutional unless the Principal Long can show that the distribution of the tickets caused a material or substantial interference with schoolwork or discipline. Plaintiffs allege that, even upon Sunny Shell's inquiry, no explanation was offered for the refusal to allow Kevin Shell to distribute religious viewpoint tickets. Therefore, under the facts as alleged by Plaintiffs, Principal Long failed to establish that Kevin Shell's distribution of tickets to religious events at Prestonwood Baptist church would cause a material or substantial disruption of schoolwork or discipline. As a result, Plaintiffs have pled facts sufficient to establish a constitutional violation on the part of Principal Long.

Next the court must determine whether Principal Long's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known. Tinker was decided more than thirty years prior to the alleged

unconstitutional acts were committed by Principal Long in the spring of 2003. In 2001, the Fifth Circuit specifically stated in Canady that Tinker provided the applicable standard of scrutiny to be applied when a school official engages in viewpoint discrimination. And in July of 2003, only months after the acts allegedly committed by Principal Long occurred, the Fifth Circuit in Chiu, specifically found that a reasonable school official would know that engaging in viewpoint discrimination was unlawful. Therefore, a reasonable school official in Principal Long's position would have known that prohibiting speech based on the viewpoint of the expression is a violation of clearly established constitutional rights. Principal Long is not entitled to dismissal under Federal Rule of Civil Procedure 12(b)(6) on the basis of qualified immunity.

2. Suzie Snyder, Teacher at Wells Elementary School

As previously discussed with respect to Principal Long, Ms. Snyder's prohibition of announcing, distributing or discussing religious materials while on school property constitutes viewpoint discrimination. Taking the facts as Plaintiffs have alleged them as true, Ms. Snyder failed to establish that Kevin Shell's distribution of tickets to religious events at his church would cause a material and substantial disruption. Ms. Snyder did not simply forbid Kevin from discussion or distribution of his religious viewpoint materials during class; rather, she allegedly prohibited the discussion or distribution of the tickets at all times while on school property. Accordingly, Plaintiffs allegations, if true, establish a constitutional violation.

As previously set forth with respect to Principal Long, the law regarding a school official's viewpoint discrimination was clearly established at the time that Ms. Snyder allegedly prohibited Kevin Shell's distribution or discussion of religious materials while on school property. Accordingly, Ms. Snyder is not entitled to dismissal of the claims against her on the basis of qualified immunity.

3. Lynn Swanson, Principal of Thomas Elementary School

With respect to Principal Swanson, the court must initially determine whether Plaintiffs allegations, if true, establish a constitutional violation. Plaintiffs have alleged in their Second Amended Complaint that Principal Swanson abridged Jonathan Morgan's First Amendment rights by prohibiting Jonathan from distributing a bookmark containing a religious message-"The Legend of the Candy Cane"-to his classmates at the Thomas Elementary Winter Break party because of the religious message it contained. Plaintiffs contend that Principal Swanson confirmed to Doug Morgan that in previous years, teachers had questioned parents and students regarding whether their goodie bags contained religious viewpoint or religious reference materials and had confiscated such materials. Principal Swanson also indicated that school officials at Thomas Elementary would continue that practice. On December 19, 2003, the day of the Winter Break party, Jonathan Morgan was prohibited from bringing his goodie bags into the classroom and was instructed that he could only leave his goodie bags on the distribution table in the library because the bags contained religious

material. Other students were permitted to bring their goodie bags into the classroom. Principal Swanson informed Doug Morgan that Jonathan's teacher had acted in accordance with PISD policy by directing Jonathan to place his goodie bags on the distribution table in the library instead of in classroom because of their religious content. The fact that PISD officials questioned students regarding the contents of their goodie bags could arguably be considered a prior restraint. However, PISD allegedly only questioned students and parents about whether their goodie bags contained religious viewpoint material. It appears that the Plaintiffs are actually alleging viewpoint discrimination. PISD officials were not reviewing the materials in order to issue a license or approval; rather, they were solely looking for religious viewpoint materials and confiscating any such materials. These allegations that Swanson committed viewpoint discrimination, without her having established that Jonathan's distribution of the bookmarks would cause a material and substantial disruption of schoolwork or discipline, are sufficient to establish a constitutional violation by Principal Swanson.

Next the court must determine whether the constitutional violation was clearly established at the time of the alleged acts by Principal Swanson such that a reasonable person in her position would have known of the illegality of her actions. The court is of the opinion that the law was clearly established under Tinker, Canady and Chiu as previously discussed with regard to the distribution of Jonathan Morgan's religious viewpoint bookmarks during a Winter Break party in which

students were allowed to distribute secular gifts without incident.

The Individual Defendants argue that *Waltz v. Egg Harbor Township Bd. of Edu.*, 342 F.3d 272 (3d Cir. 2003) creates uncertainty as to whether the law was clearly established. However, Waltz does not create an ambiguity as to the state of the law in this circuit based on the facts alleged by Plaintiffs. In Waltz, the plaintiff student also wanted to distribute a gift to his classmates that had a religious message during the holiday party, but the gifts distributed to the students were neutral gifts collected by the parent teacher organization beforehand and distributed by the parents at the party. Students were not only prohibited from distributing religious gifts, but were also prohibited from distributing gifts with a political or a commercial message pursuant to an unwritten school policy. *Id.* at 273. Additionally, in Waltz, the plaintiff student was allowed to distribute his gifts containing a religious message at recess, after school and in the hallways. *Id.* at 280. In the present case, the individual students themselves brought goodie bags to school for distribution to their classmates. Further, Plaintiffs allege that Jonathan Morgan was not allowed to distribute his gifts containing a religious message at all while he was on school property; rather, he could only leave his goodie bags on a table in the library, while other students could hand out gifts that contained secular messages in the classroom. Waltz is not binding authority in this circuit and even though it can be considered persuasive authority, it does not cast doubt onto the status of the law that binds this court with respect to viewpoint discrimination.

Plaintiffs also allege that Principal Swanson infringed on the constitutional rights of Doug and Robin Morgan by not allowing them to distribute the "Legend of the Candy Cane" bookmarks to other parents at the party because of the religious nature of the bookmark. In order to determine whether the rights of Doug and Robin Morgan were abridged, the court would typically need to conduct a forum analysis. However, as set out in Chiu, viewpoint discrimination is unconstitutional regardless of the forum. Therefore, for purposes of the Individual Defendants' motion to dismiss pursuant to Rule 12(b)(6), Plaintiffs have alleged facts that, taken as true, establish that Swanson violated the constitutional rights of Doug and Robin Morgan.

With respect to Principal Swanson's prohibiting the distribution of the bookmarks from Doug and Robin Morgan to other parents at the Winter Break party, the law was also clearly established. In July of 2003, roughly five months prior to the 2003 Winter Break party, the Fifth Circuit specifically held that viewpoint discrimination was unconstitutional regardless of the forum.[5] *Chiu*, 260 F.3d at 350-51. Accordingly, Principal Swanson is not entitled to dismissal on the basis of qualified immunity.

4. Dr. Doug Otto, Superintendent of Plano Independent School District

In January of 2004, Sunny Shell's children Kevin and Michael Shell again wished to distribute tickets

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[5] Plano ISD was a party to that litigation; therefore, PISD officials should have known about the status of the law with respect to viewpoint discrimination.

to a Harvest Rally being held at Prestonwood Baptist Church. During 2004, Kevin and Michael Shell attended Hughston Elementary. The principal of Hughston elementary informed Sunny Shell that Kevin and Michael Shell would never be permitted to distribute religious materials while on school property and could not make an announcement about the tickets during class or recess. Plaintiffs allege that on January 26, 2004, Sunny Shell emailed Dr. Otto concerning the distribution of tickets to religious viewpoint events while on school property. Plaintiffs further allege that Sunny Shell did not receive a response from Dr. Otto indicating that Kevin and Michael Shell would be permitted to distribute the tickets to the Harvest Rally.

Plaintiffs seek to hold Dr. Otto individually liable for civil damages based on these allegations. Plaintiffs have failed to make any allegation that Dr. Otto specifically prohibited any expression on the part of the Shells, much less an allegation that he did so based on the viewpoint of the expression. Taking the facts alleged in the Second Amended complaint as true, Plaintiffs have failed to establish a cause of action against Dr. Otto in his individual capacity; rather, Dr. Otto is entitled to dismissal of the claims against him in his individual capacity under the doctrine of qualified immunity.

5. John Beasley, Security Police Specialist for Plano ISD's East Cluster

First, the court must determine whether Plaintiffs allegations against Mr. Beasley in his individual capacity, if true, establish a constitutional violation. Plaintiffs have alleged in their Second Amended Complaint that Mr. Beasely

threatened Sherrie Versher in response to the exercise of her constitutional rights by delivering a letter to Ms. Versher upon her arrival at Principal Jackie Bomchill's office on January 16, 2004. Plaintiffs allege that on January 15, 2004, Ms. Versher attempted to meet with Principal Bomchill in order to obtain permission for her daughter Stephanie Versher to distribute brownies the following day at her half birthday party. Principal Bomchill was not available on January 15, 2004, so Ms. Versher again attempted to meet with Principal Bomchill immediately before Stephanie's half birthday party on January 16, 2004, in order to obtain permission for Stephanie to distribute brownies and two pencils to her classmates. It was upon her arrival at Principal Bomchill's office that Mr. Beasley handed her the letter he had prepared, which referred her to PISD policies and informed her that if she violated the policies, law enforcement officials would be called. Prior to the delivery of this letter, Plaintiffs only allege that Sherrie Versher attempted to meet with Principal Bomchill to obtain permission to pass out brownies. From the facts alleged, it does not appear that Sherrie Versher has a constitutional right to pass out brownies; therefore, Mr. Beasley's letter could not be for the purpose of retaliating against Ms. Versher for exercising her constitutional rights.

Plaintiffs further allege that Ms. Versher met with Principal Bomchill on January 16, 2004, and Principal Bomchill informed her that Stephanie would not be allowed to distribute her a pencil bearing the words "Jesus loves me this I know for the Bible tells me so," but that Stephanie would be able to distribute a pencil with the word "Moon"

written on it. While exiting the office after this meeting with Principal Bomchill, Ms. Versher "thought aloud to herself "Satan is in the building.' " After this occurrence, Mr. Beasley followed Ms. Versher to Stephanie's half birthday party and watched her from a distance. At the conclusion of the party, Ms. Versher walked Stephanie to her locker, then she proceeded down another hallway of the building. Mr. Beasley followed her down the hall and upon Ms. Versher's inquiry as to why he was following her, Mr. Beasley replied that he was escorting her out of the building and that the authorities had been called. Mr. Beasley provides security for PISD, and it appears that after Ms. Versher had audibly uttered "Satan is in the Building" and continued to roam the halls of the elementary school after her daughter's half birthday was completed, Mr. Beasley would be acting within his authority to ask her to leave the building. For the safety of the students, adults should not be allowed to roam through the halls of an elementary school without permission from the school administration. Accordingly, Mr. Beasely did not violate Sherrie Verhser's constitutional rights by instructing her to leave the building at the conclusion of the half birthday party.

Finally, Plaintiffs appear to allege that Mr. Beasley abridged Stephanie Versher's First Amendment rights by prohibiting her from passing out her "Jesus love me" pencils after school hours on school property. Plaintiffs allege that Ms. Bomchill took away a pencil that Stephanie had distributed to a friend, informed Stephanie that she was in violation of PISD policy, and stated that Stephanie was not allowed to distribute religious pencils while

on school property. Plaintiffs then allege that Bomchill and Beasley approached Sherrie Versher and stated that if Stephanie tried to distribute Christian tickets or "Jesus" pencils again, she would be kicked out of school. The court is of the opinion that this does not rise to the level of a constitutional violation on the part of Mr. Beasley. Mr. Beasley did not actually prohibit Stephanie from distributing her pencils, and the Second Amended Complaint is vague as to who actually told Sherrie Versher that her daughter would be expelled if she continued to distribute religious tickets and "Jesus" pencils. Further, when qualified immunity is asserted, Plaintiffs are required to specifically plead the facts establishing the right to recover. *Shultea v. Wood*, 47 F.3d at 1430. Plaintiffs have simply failed to allege with sufficient specificity that Beasley prevented Versher or her daughter from distributing religious materials. The court finds that, even when viewing the Second Amended Complaint in the light most favorable to the Plaintiffs, they have failed to meet their burden for establishing the inapplicability of the defense of qualified immunity with respect to Mr. Beasley because Plaintiffs have failed to allege a constitutional violation. Accordingly, the Individual Defendants Motion to Dismiss on the Basis of Qualified Immunity should be granted with respect to Mr. Beasley.

6. Carole Greisdorf, Assistant Superintendent of Plano Independent School District

The court must first determine whether Plaintiffs have alleged a constitutional violation on

the part of Ms. Greisdorf. In December of 2003, Doug Morgan contacted Ms. Greisdorf to inquire about the student to student distribution of religious material. Ms. Greisdorf suggested that Doug Morgan set up a meeting with Principal Swanson to discuss the matter. After Doug Morgan met with Principal Swanson, he emailed Ms. Greisdorf about his conversation with Principal Swanson. Doug Morgan also asked whether Jonathan Morgan could distribute his "The Legend of the Candy Cane" bookmark gifts. Ms. Greisdorf responded that Principal Swanson's interpretation of the policy was correct and that no student could distribute religious viewpoint gifts while on school property. Ms. Greisdorf stated that Jonathan Morgan could only disseminate his information by placing it on the information table or by distributing it off campus. Two days later, Doug Morgan and Jonathan Morgan took Jonathan's goodie bags that contained "The Legend of the Candy Cane" bookmark gifts to school. Plaintiffs do not allege that Ms. Greisdorf prohibited or prevented Jonathan Morgan from distributing his religious viewpoint gifts. In fact, when taking the facts as Plaintiff alleges them to be true, Ms. Greisdorf's statements did not deter Jonathan Morgan at all from bringing his religious viewpoint gifts to school for distribution. As a result, Plaintiffs have failed to plead facts establishing that Ms. Greisdorf violated the constitutional rights of Jonathan Morgan.

Plaintiffs also allege that in May of 2003, after Principal Long and Ms. Snyder had prohibited Kevin Shell from distributing tickets to religious events at school, Sunny Shell asked Ms. Greisdorf to provide the correct interpretation and application of

the PISD policy regarding announcing and distributing materials from one student to another. Ms. Greisdorf allegedly stated that under PISD policy, the Shells could not announce or offer religious materials or religious information to another student at any time while on school property. Plaintiffs do not allege that Ms. Greisdorf actually prohibited Kevin and Michael Shell from passing out tickets to religious events. Instead, Plaintiffs simply allege that Sunny Shell contacted Ms. Greisdorf after the distribution had already been prohibited by Principal Long and Ms. Snyder. Plaintiffs have simply failed to allege a constitutional violation by Ms. Greisdorf with respect to Kevin and Michael Shell.

Sunny Shell again contacted Ms. Greisdorf in 2004 to inquire about Kevin and Michael Shell's distribution of Harvest Rally tickets. Harvest Rally was an event sponsored by Prestonwood Baptist Church. Ms. Greisdorf responded by referring Sunny Shell to policy FNAA (LOCAL) and directed her to contact her school principal. Again, Plaintiffs have failed to allege that Ms. Greisdorf prohibited the distribution of religious viewpoint tickets.

Because Plaintiffs have not alleged facts that would establish that Ms. Greisdorf violated the constitutional rights of any of the plaintiffs, the Individual Defendants' Motion to Dismiss on the Basis of Qualified Immunity should be granted with respect to Carole Greisdorf.

Establishment Clause Considerations

The Individual Defendants also argue that the contours of the law were not clearly established

because the distribution in question raises potential Establishment Clause violations on the part of PISD employees. In support of their argument, the Individual Defendants rely on *Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985). In Bell, teachers were initially supervising and participating in religiously-oriented meetings involving students and non-students immediately before school. *Id.* at 1397. Eventually, teachers were disallowed from participating, but one teacher was required to monitor the student-led activity. The Tenth Circuit found it significant that the teachers had participated in the meetings at one time when finding that the presence of even one teacher produced the same appearance of school authorization or approval. *Id.* at 1405.

While this case may be instructive, it is not binding authority, and the court finds that it is not applicable to the facts as alleged by Plaintiffs. Plaintiffs allege that students were prohibited from distributing religious viewpoint material to other students, not only during instructional times, but at all times while on school property. Jonathan Morgan did seek to distribute his religious gift in the classroom during a Winter Break party, but he sought to distribute it during a party in a closed bag bearing a sticker that read: "To [classmate's name] From: Jonathan Morgan." Taking the facts as Plaintiffs have alleged them to be true, Establishment Clause concerns do not muddy the waters as to the clearly established law in this circuit prohibiting viewpoint discrimination.

CONCLUSION

For the foregoing reasons, the Individual Defendants' Motion to Dismiss on the Basis of Qualified Immunity should be Denied with respect to Lisa Long in her individual capacity, Suzie Snyder in her individual capacity and Lynn Swanson in her individual capacity. The Individual Defendants' Motion to Dismiss on the Basis of Qualified Immunity should be Granted with respect to Dr. Doug Otto in his individual capacity, John Beasley in his individual capacity and Carole Greisdorf in her individual capacity.

RECOMMENDATION

Based upon the foregoing, it is the Court's recommendation that Individual Defendants' Motion to Dismiss Based on Qualified Immunity [Doc. No. 30] should be GRANTED in PART and DENIED in PART.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d

435 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

Appendix G

PLANO INDEPENDENT SCHOOL DISTRICT POLICY 043190 [FNAA-LOCAL]

STUDENT EXPRESSION: DISTRIBUTION OF NONSCHOOL LITERATURE

Issued October 20, 2003
Adopted October 21, 2003

PRIOR REVIEW

For purposes of this policy, "distribution" means circulation of any written material, tapes, or other media over which the school does not exercise control and that is intended for dissemination to students.

The District's classrooms during the school day are provided for the limited purpose of delivering instruction to students in the course and subjects in which they are enrolled. Hallways in school buildings are provided for the limited purpose of facilitating the movement of students between classes and allowing access to assigned lockers. Classrooms and hallways shall not be used for the distribution of any materials over which the school does not exercise control.

Each school campus shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed. Campus principals may develop reasonable time, place, and manner restrictions regarding the distribution of materials at designated areas.

All written material over which the school does not exercise control and that is intended for distribution to students shall be submitted to the building principal or designee for prior review according to the following procedures:

1. In order to be considered for distribution, materials shall include the name of the organization or individual sponsoring the distribution.
2. Using the standards below at LIMITATIONS ON CONTENT, the principal or designee shall approve or reject submitted material within three school days of the time the material is received.
3. The student may appeal the principal's decision in accordance with FNG(LOCAL), beginning at Level Two.

Students who fail to follow these procedures may be disciplined in accordance with the FO series and the Student Code of Conduct.

LIMITATIONS ON CONTENT

Nonschool materials shall not be distributed if:

1. The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience.
2. The materials endorse actions endangering the health or safety of students.
3. The distribution of such materials would violate the intellectual property rights, privacy rights, or other rights of another person.

4. The materials contain defamatory statements about public figures or others.

5. The materials criticize Board members or school officials or advocate violation of school rules and fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA (LEGAL).

6. The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action.

7. The materials include hate literature that scurrilously attacks ethnic, religious, or racist groups, and similar publications aimed at creating hostility and violence if they fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA(LEGAL).

For distribution of nonschool literature by nonstudents, see GKD.

PLANO INDEPENDENT SCHOOL DISTRICT POLICY 043190 [FNAA-LOCAL]

STUDENT EXPRESSION: DISTRIBUTION OF NONSCHOOL LITERATURE

Issued April 4, 2005
Readopted Nov. 1, 2005

DEFINITIONS

For purposes of this policy:

1. "Classroom" is defined as any location designated for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. In addition to traditional classrooms, the term "classroom" includes, but is not limited to, school campus gymnasiums, auditoriums, cafeterias, hallways, and outdoor facilities.
2. "Distribution" means circulation of any materials, as defined herein.
3. "Materials" are defined as writings, items, objects, articles or other materials.
4. "School hours" are defined as the operational hours for a particular facility when students are receiving educational instruction, participating in or attending extracurricular activities, or otherwise being involved in educational/curricular programming.

5. Elementary, middle, and secondary campuses have different distribution policies and guidelines due to the age/maturity of students and the highly structured learning environment of elementary campuses. "Elementary" campuses are defined as campuses designated for students up to fifth grade. "Middle" and "secondary" campuses are defined as campuses designated for students from sixth grade through twelfth grade.

DISTRIBUTION ON ELEMENTARY CAMPUSES BY STUDENTS

Elementary campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state-mandated learning requirements. The following regulations apply to the distribution of materials between elementary students while on the elementary campus, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Students may distribute materials 30 minutes before school hours and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas to be designated by the principal.
2. Distribution of materials is not permitted in the classroom during school hours with the exception during the three annual parties designated by the District.
3. District elementary school hallways during school hours are provided for the limited purpose

of facilitating the safe, organized, and structured movement of students between classes and allowing access to assigned lockers for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the hallways, students may not distribute materials in elementary school hallways during school hours.

4. District elementary school cafeterias, during designated meal periods, are provided for the limited purpose of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the cafeteria, students may not distribute materials in elementary school cafeterias during designated meal periods.
5. Students may distribute materials during designated recess periods.
6. Students may leave materials on the "distribution table" and/or any other such designated area so others may obtain a copy. Each school campus principal shall designate an area where materials may be made available or distributed.

7. Students may distribute materials during the three annual parties designated by the District.
8. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.
9. Students may distribute materials in areas not addressed by this policy subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein.

Students are expected to comply with all applicable District and/or campus behavior rules, policies and all educational/curricular goals when distributing materials on District property. Copies of applicable District and campus rules and/or policies are available at each campus.

Students who distribute materials on District property at any time shall be responsible for cleaning up such materials left on District property.

Students violating any provision of this policy may be subject to discipline including, but not limited to, prohibition of further distribution under this policy.

LIMITATIONS ON CONTENT

Material shall not be distributed if:

1. The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience.

2. The materials endorse actions endangering the health or safety of students.

3. The materials advocate violation of school rules and fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA (LEGAL).

4. The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action.

5. The materials include hate literature that scurrilously attacks ethnic, religious, or racial groups and similar publications aimed at creating hostility and violence if they fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA(LEGAL).

6. There is reasonable cause to believe that distribution of the materials would result in material and substantial interference with any school education and/or curricular related activity or that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.

DISTRIBUTION ON MIDDLE AND SECONDARY CAMPUSES BY STUDENTS

Middle school and secondary school campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state-mandated learning requirements. The following guidelines apply to distribution of materials between middle and secondary school students while on middle and secondary campuses, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Subject to the restrictions herein, students may distribute materials 30 minutes before school hours and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas shall be designated by the principal.
2. Distribution of materials is not permitted in the classrooms during school hours.
3. Middle and secondary students may distribute materials in middle and secondary school hallways during noninstructional times during school hours.
4. Middle and secondary students may distribute materials in middle and secondary campus cafeterias during designated lunch periods and noninstructional time.
5. Students may leave materials on the "distribution table" and/or any other designated area so that others may obtain a copy. Each school campus principal shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed.
6. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.
7. Students may distribute materials in areas not addressed by this policy, subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein.

Students are expected to comply with all applicable District and/or campus behavior rules, policies, and all educational/curricular goals when distributing materials on District property. Copies of applicable District and campus rules and/or policies are available at each campus.

Students who distribute materials on District property at any time shall be responsible for cleaning up such materials left on District property.

Students violating any provision of this policy may be subject to discipline including, but not limited to, prohibition of further distribution under this policy.

LIMITATIONS ON CONTENT

Materials shall not be distributed if:

1. The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience.
2. The materials endorse actions endangering the health or safety of students.
3. The materials advocate violation of school rules and fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA (LEGAL).
4. The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action.
5. The materials include hate literature that scurrilously attacks ethnic, religious, or racial groups and similar publications aimed at creating hostility and violence if they fall within

the standard described at LIMITATIONS ON EXPRESSION at FNAA(LEGAL).

6. There is reasonable cause to believe that distribution of the materials would result in material and substantial interference with any school education and/or curricular related activity or that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.

PLANO INDEPENDENT SCHOOL DISTRICT PREAMBLE TO POLICY 043190 — *STUDENT EXPRESSION: DISTRIBUTION OF NONSCHOOL LITERATURE*

Issued Nov. 1, 2005

PREAMBLE

WHEREAS, the Board of Trustees finds it is the mission of the District to teach and train its students state and federally mandated curriculum and learning requirements, social skills and values, order, discipline and respect for authority and each other; and

WHEREAS, the Board of Trustees finds that without first establishing discipline and maintaining order at the schools, teachers cannot begin to educate their students; and

WHEREAS, the Board of Trustees finds the District has a limited amount of time available to teach its students the above; and

WHEREAS, the Board of Trustees finds that students should have an opportunity to distribute non-school materials in a manner that does not disrupt the educational process, the order and discipline of the schools and/or the operation of the schools; and

WHEREAS, the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to regulate the time, place and manner of non-school materials during times and places when the District is attempting to operate the schools and teach its students the above which the Board of Trustees finds to be reasonable and content neutral; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) relating to elementary schools are also intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering; and

WHEREAS, the Board of Trustees finds that, from an educational perspective, the distribution of non-school materials during times and places when the District is attempting to teach students is both distracting and a material and substantial disruption to the educational process and environment and to the order and discipline of the schools; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) leave open alternative forms of communication of non-school materials, such as alternative times and places to distribute such materials, non-disruptive oral speech, and "distribution tables"; and

WHEREAS, the Board of Trustees acknowledges receipt of testimony from educators, professionals and others and various written materials, including, but not limited to, studies, research, evaluations,

and other findings that overwhelming support the adoption of Polices FNAA(LOCAL) and GKD(LOCAL); and

WHEREAS, the Board of Trustees believes that, to better improve the educational process, environment, safety and order at District schools, it is necessary to adopt the reasonable time, place and manner regulations in Policies FNAA(LOCAL) and GKD(LOCAL):

The Board of Trustees hereby approves and adopts the above findings to support the passage of and hereby adopts Policies FNAA(LOCAL) and GKD(LOCAL).